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In the Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 692, 694 (1978), the Court held that municipality liability under 42 U.S.C. § 1983 may not rest on a theory of *respondeat superior* but requires a showing that the municipality *itself*, through "the execution of a government[al] policy or custom," "'cause[d]' an employee to violate another's constitutional rights." In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), the Court made clear that liability may be based on the single act of a municipal employee, but only if the employee has final authority to make policy for the municipality. In *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 126 (1988), the plurality cautioned that, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."

The questions presented in this case are:

1. Whether NEV. REV. STAT. 252.070(1), which authorizes district attorneys to appoint deputies and provides that such deputies "may transact" all of the "official business" of their offices, confers "*final policymaking* authority" as a matter of law on those deputies.

2. Whether the municipality, or the plaintiff, bears the burden of proof in a § 1983 action to show that a subordinate official who allegedly has been delegated "final policymaking authority" by state law actually exercises such authority in practice, free from constraints imposed by his superiors.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioner states that no parties before the court of appeals are not named in the caption. The caption in the Ninth Circuit also includes Darrin Sloan, Robert Guimont, Rod Ba[illegible]ter, and Does 1-10, but those individuals were not parties to petitioner's appeal against respondent Webb in the Ninth Circuit.

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OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1a-18a) is reported at 330 F.3d 1158. The district court's decisions granting in part and denying in part summary judgment and holding that deputy district attorneys in Nevada are policymakers as a matter of law (App., *infra*, 22a-50a, 51a-58a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. App., *infra*, 1a. On August 18, 2003, Justice O'Connor extended the time in which to file a petition for certiorari, to and including September 26. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Nevada Revised Statutes are set forth at App., *infra*, 59a-64a.

STATEMENT

In the decision below, the Ninth Circuit has ruled that deputy district attorneys in the State of Nevada are final policymakers *as a matter of law* for the purpose of affixing municipal liability under 42 U.S.C. § 1983 and *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The Ninth Circuit based its decision on nothing more than a Nevada statute – identical to or indistinguishable from statutes in many other States – that authorizes prosecuting attorneys to appoint deputies and, in turn, permits those deputies to "transact all official business relating to the[ir] offices to the same extent as their principals." NEV. REV. STAT. § 252.070(1). Under the Ninth Circuit's view, the Nevada legislature, by passing this statute in 1905, delegated *final* authority to every deputy district attorney in Nevada to *make policy* for his or her respective district attorney's office (and county). From that far-fetched holding,

and without evidence of any *other* baseless prosecutions, the Ninth Circuit reached the even more surprising conclusion that it is *municipal policy* in Carson City – not just individual misconduct – to effect baseless prosecutions. And the Ninth Circuit reached those conclusions even though the only evidence presented at trial as to whether the Carson City District Attorney's office actually had a policy of initiating or continuing prosecutions without probable cause – the "final policy" supposedly reflected in the actions of a deputy prosecuting attorney in this case – showed that the District Attorney had an official policy *against* pursuing such prosecutions.

The Ninth Circuit's decision converts the exercise of distinguishing municipal policy from individual misconduct into a farce. It ignores the plurality's admonition, in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), that "[i]f the mere exercise of *discretion* by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." *Id.* at 126 (emphasis added). And, if left uncorrected, the Ninth Circuit's creation of an entirely new class of subordinate officials who will be treated as municipal policymakers *as a matter of law* (requiring no proof by a plaintiff) will have profoundly negative consequences that extend far beyond the halls of district attorneys' offices in Nevada and far beyond the borders of the State. In Nevada alone, deputy county assessors, deputy county recorders, deputy county clerks, deputy county treasurers, and deputy sheriffs all draw their statutory authority to act in the place of their principals from statutes containing identical or functionally identical language. Elsewhere in the Ninth Circuit, five States other than Nevada have deputy district attorneys who are mentioned in identical or indistinguishable statutes (in some of those States, other county officials' deputies are also mentioned in similar laws). Beyond that, several States outside the Ninth Circuit have statutes conveying similar authority to deputy or assistant prosecutors.

The consequences for the effective functioning of prosecutors would be especially severe. Prosecutors enjoy absolute

immunity from damages actions under 42 U.S.C. § 1983 challenging actions taken within the scope of their prosecutorial duties. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Under the decision below, however, the very same conduct that is shielded by absolute immunity may be called into question in a suit brought against a municipality. If permitted to stand, the Ninth Circuit's decision will have the effect of eroding the sound public-policy foundation on which prosecutorial immunity is based and diminishing the important benefits of that immunity (that independent prosecutorial decisions not be affected by outside influences or fear of liability). To prevent those negative consequences, and clarify the principles governing municipal liability, review by this Court is warranted.

A. Factual Background

This case arises out of the arrest, incarceration, and prosecution of respondent David Webb by the Carson City's sheriff's and district attorney's offices. On June 27, 1997, Carson City Sheriff's Deputy Darrin Sloan observed a speeding vehicle, which he then chased until it pulled into the parking lot of the Carson City Inn. Appellant's C.A. Excerpts of Record ("ER") 115. The driver ran from the vehicle and jumped over a fence. Sloan chased the individual but lost sight of him in a trailer park behind the inn. Other officers set up a perimeter around the area. ER 116, 117. Deputy Sloan did not get a clear view of the driver but did notice that he was a black adult male wearing dark pants and no shirt. ER 115. As Sloan would later testify at trial, the suspect carried a backpack. ER 134.

After the unsuccessful foot pursuit, Deputy Sloan returned to inspect the abandoned vehicle and then heard over his radio that a black male was spotted running in the direction in which Sloan had chased his suspect and into the parking lot of a nearby office building called the Evergreen Center. ER 119, 135. Sloan later concluded, based on all the circumstances, that the individual detained by other officers at the Evergreen Center (respondent David Webb) was also the driver. ER 121-123.

At trial, Webb testified that during the evening he was out walking while waiting for his money to arrive so that he would be able to check into a motel. During his walk, and while he was in the bushes preparing to urinate, he heard someone yell "there's a black man." ER 108-111. He walked behind the Evergreen Center and hid behind a parked car. ER 112. Deputy Guimont found Webb there and detained him. ER 112-114. Webb was questioned and subsequently arrested after Deputy Sloan arrived and identified him as the man he had been chasing. ER 120. Webb was taken into custody, charged with various traffic offenses and with obstructing the police, and held in the local jail.

A week later, on July 3, 1997, Deputy Sloan received word that an informant who called the Sheriff's Department told another officer that a black man named Freddy Little was bragging about having escaped from the cops on the evening of June 27, 1997. ER 120. That information caused Sloan to doubt whether Webb was the individual he had chased. Sloan testified that he contacted Deputy District Attorney Melanie Bruketta and told her of the new information. Sloan testified that his discussion with Ms. Bruketta occurred on the first business day after July 4. ER 124. Ms. Bruketta, however, testified that she first received the possibly exculpatory information on the day she secured Webb's release: July 16, 1997. ER 132-133. The traffic charges against Webb eventually were dropped. Webb was later acquitted at a bench trial of obstructing or delaying a sheriff's deputy.

B. The Proceedings in the Trial Court

On November 26, 1997, respondent Webb filed a complaint in the United States District Court for the Northern District of Nevada. In the complaint, Webb advanced nine separate claims for relief under 42 U.S.C. § 1983 and state law. See App., *infra*, 4a n.3 (describing claims). Webb named as defendants Carson City Sheriff Rod Banister, Sheriff's Deputies Darrin Sloan and Robert Guimont, and Carson City. Notably, Webb did not name as defendants any of the deputy district attorneys who were

involved in his prosecution (all of whom were absolutely immune from liability). Sheriff Banister was dismissed on defendants' motion for summary judgment. App., *infra*, 41a-42a, 49a. Deputy Guimont was dismissed voluntarily by plaintiff Webb after jury selection but before the presentation of any evidence at trial. ER 105.

Following trial, the jury found in favor of Deputy Sloan on all claims against him, and in favor of petitioner Carson City on all claims against it related to Webb's arrest. The jury returned a judgment in favor of Webb, however, on his state tort claims against Carson City of false imprisonment, malicious prosecution, and misuse of process, and on his municipal liability claim under 42 U.S.C. § 1983 against the City based solely on the actions taken by prosecutors.

On three occasions, Carson City argued that there was no basis for finding municipal liability on Webb's claims. The first instance was in Carson City's opposition to Webb's motion for partial summary judgment. ER 60, 74-77. Carson City argued that it had no liability because Webb failed to establish that Carson City had a policy or custom of maliciously prosecuting or falsely imprisoning citizens, nor had he identified a policymaker for whom the City would have liability in an isolated instance. Webb's only argument regarding official policy and policymakers was to assert that NEV. REV. STAT. 252.070(1) grants a deputy district attorney the authority to transact all official business to the same extent as the district attorney, and that a deputy district attorney "therefore had *policy-making* authority" to dismiss unfounded charges (and thus "became a policymaker whose decisions bound Defendant Carson City for purposes of section 1983"). Plaintiff's Motion for Partial Summary Judgment, at 23 (July 10, 2000) (emphasis added).[1] Despite the absence of any evidence of a delegation of

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[1] In advancing this argument, Webb was merely reiterating the district court's rationale in its earlier opinion denying in part and granting in part the defendants' motion for summary judgment. See App., *infra*, 42a-44a.

authority to Carson City deputy district attorneys or any evidence of a pervasive custom or practice of the City to prosecute or imprison without probable cause, the district court agreed that Nevada law confers on deputy district attorneys final policymaking authority. App., *infra*, 42a-44a, 49a, 57a.

At trial, Webb testified and called three other witnesses: Sheriff's Deputies Sloan and Guimont, and Beverly Moltz, a sergeant with the Carson City Sheriff's Department at the time of Webb's arrest. None of Webb's witnesses offered any evidence regarding policies, customs, or practices of the Carson City District Attorney's Office, or about who has policymaking authority in that office, or about who may have been delegated such authority within the office.

At the close of Webb's case, Carson City renewed its argument that Webb had failed to provide any evidence sufficient to impose municipal liability on the City. ER 125, 126. The court again denied the City's motion to dismiss claims against it, holding that deputy district attorneys are final policymakers for municipalities in the State of Nevada as a matter of law.

During their case-in-chief, petitioner Carson City and the other defendants called Deputy District Attorney Melanie Bruketta. Ms. Bruketta was asked about the district attorney's office policy regarding prosecution and probable cause (ER 133):

> Q Now, does the Carson City district attorney's office have a policy of prosecuting individuals without probable cause?
>
> A No.
>
> Q Is the opposite the case, that there's a policy of not prosecuting individuals if probable cause does not exist to do so?
>
> A If probable cause does not exist, we will not prosecute.

On cross-examination, Ms. Bruketta was questioned about the power that rests in the Office of the District Attorney. She

testified that the office does have the power to determine who will be prosecuted, the power to decline to go forward with a case, and the power to recommend dismissal of a case. Webb's counsel asked Ms. Bruketta no questions regarding whether, as a deputy district attorney, she had policymaking authority or had been delegated such authority by the district attorney or any other city official. Her testimony was the only evidence presented at trial concerning the authority of a deputy district attorney. As noted above, respondent did not name any deputy district attorney as a defendant in his lawsuit, and he called none to testify regarding the prosecution of criminal charges against him. Thus, the record is bereft of any evidence to suggest either an actual policy on the part of Carson City, a custom or practice that could give rise to an inference that a policy existed, or a delegation of authority to a deputy district attorney by anyone.

At the instruction conference, held after the close of evidence, Carson City again objected to the district court's ruling that deputy district attorneys are policymakers. Over the City's objection, the Court gave three instructions that established for the jurors that deputy district attorneys are policymakers as a matter of law (ER 138-140):

> Instruction No. 61. The acts or omissions of a Deputy District Attorney constitute official policy of the city and/or county of Carson City, Nevada.
>
> Instruction No. 62. If you find that the acts of any policymaker in his or her official capacity deprived plaintiff of his constitutional rights, Defendant Carson City will be liable for such depravations [*sic*].

Instruction No. 63. When a government decision maker has final authority to establish governmental policy with respect to the action ordered or omitted, and a deliberate choice to follow a course of action is made from among various alternatives, governmental liability can be found based on a single incident of alleged wrongful activity.

The jury was provided with special interrogatories as to Carson City. The first asked "Did [P]laintiff prove that Defendant Carson City has a custom, policy, or practice that violated the Plaintiff's federal constitutional right not to be prosecuted without probable cause?" The jury answered "yes." ER 141. The third special interrogatory asked, "Did Plaintiff prove that Defendant Carson City has a custom, policy, or practice to falsely imprison individuals?" The jury answered "yes." ER 142.

These were the only federal claims for which the jury found Carson City liable. The jury also found that Carson City had committed the state torts of false imprisonment, malicious prosecution, and misuse of process. It is Carson City's position, however – preserved in the trial court and on appeal – that state sovereign immunity bars awards against Carson City for those state torts. See note 3, *infra*.

C. The Court of Appeals' Decision

A panel of the Ninth Circuit affirmed. App., *infra*, 1a-18a.[2] As an initial matter, the panel acknowledged that municipal liability under 42 U.S.C. § 1983 "cannot be founded on a theory of *respondeat superior*." App., *infra*,6a. In enacting the statute, the panel explained, Congress "intended to hold municipalities

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[2] In an unpublished decision, the Ninth Circuit also resolved respondent Webb's cross-appeal concerning attorney's fees and other issues. See App., *infra*, 19a-21a.

liable only when action pursuant to official municipal policy of some nature caused a constitutional tort." *Ibid.* (internal quotations omitted). "Generally, then," the panel explained, "the actions of individual employees can support liability against a municipality under § 1983 only if the employees were acting pursuant to an official municipal policy." *Ibid.*

Next, the panel identified "two alternative ways" under the Ninth Circuit's case law that municipal liability "can attach" even if a municipality has not "expressly adopted" a policy. App., *infra*, 6a. The court explained:

> First, if an employee commits a constitutional violation pursuant to a long-standing practice or custom, the employee's act is sufficient to support municipal liability. By contrast, "[a] single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom." [Second,] [a] municipality can be liable even for an isolated constitutional violation * * * when the person causing the violation has final policymaking authority.

Id. at 7a (citations omitted). Under the first alternative, the court explained, a plaintiff "must prove the existence of a long-standing practice or policy to the satisfaction of the fact-finder." *Ibid.* Under the second alternative, however, "the court must decide, as a matter of state law and before the case may be submitted to the jury, whether the person who committed the violation had final policymaking authority." *Ibid.*

Next, the Ninth Circuit held that there was no reason to examine Webb's argument under the first alternative ("that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent") because it agreed with Webb that he had satisfied the second method. App., *infra*, 7a. The panel proceeded to quote the Nevada statute that provides: "All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals." NEV. REV. STAT. 252.070(1). "By its plain text," the panel reasoned, this

provision "confers *authority* on deputy district attorneys that is coextensive with the authority enjoyed by principal district attorneys." App., *infra*, 8a (emphasis added). Without pausing to examine the distinction between the authority to *take particular action* and the authority to *make municipal policy*, the panel asserted that, "if principal district attorneys are final policymakers, then so are their deputies." *Ibid.*

The panel further declared that the question whether "the *principal* prosecutor has final policymaking authority" is "easily resolved." App., *infra*, 8a (emphasis added). Because Nevada law grants to the district attorney the entire control over the prosecution of a criminal case, the court reasoned, the district attorney is a final policymaker "in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute." *Ibid.* That conclusion, the panel continued, is in no way undercut by the fact that the state attorney general exercises supervisory authority over the county district attorneys. Under Nevada law, the attorney general's oversight powers are "discretionary and permissive"; and, "[i]n light of [Nevada case law], and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power," the court "h[e]ld that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions." *Id.* at 8a-9a.

Turning to the role of deputy prosecutors, the panel reiterated its view that NEV. REV. STAT. 252.070(1) "confers the same final policymaking authority on deputy district attorneys." App., *infra*, 9a. "The principal," the panel reasoned, "does not delegate constrained discretion to a deputy upon appointment. Rather, the legislature states that, upon appointment, deputies may transact all official duties *to the same extent as* their principals." *Ibid.*; see also *id.* at 10a (stating that the legislature had "directly delegate[d] coextensive authority to the principal prosecutor and the deputies"). Notwithstanding this supposed directive by the Nevada legislature, the panel left open the

possibility that a deputy prosecutor's authority might be limited by his superior:

> We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary.

Id. at 10a; see also *ibid.* (noting that "Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against [Webb] without consulting any supervisor"). The Ninth Circuit made no effort at all to explain how case-specific decisions about how to handle Webb's case could be viewed as *municipal policy*; rather, it seemed to think that how to handle Webb's case was *ipso facto* a question of municipal policy, and that it need only address who had decisionmaking authority.[3]

REASONS FOR GRANTING THE PETITION

This case raises vitally important questions concerning the scope of municipal liability under 42 U.S.C. § 1983. Twenty-five years ago, this Court held that municipalities and other bodies of local government are "persons" within the meaning of § 1983. *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The Court further held that § 1983 authorizes suit for constitutional deprivations occurring as the result of governmental custom even though such a custom has not received formal approval through the official decisionmaking channels. The Court concluded, however, that the doctrine of

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[3] The panel found it unnecessary to consider Carson City's challenge to the state law counts, explaining that the verdict could and would stand if the federal municipal liability claims were valid (which the court held they were). App., *infra*, 11a-12a.

respondeat superior was inappropriate in the context of §1983 and decided that municipalities can be held liable only when the constitutional injury was caused by a municipality's lawmakers or those whose edicts or acts may fairly be said to represent official policy.

Those principles were further refined in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). In *Pembaur*, the Court held that municipalities may be held liable under §1983 only for acts that the municipality has officially sanctioned or ordered. Furthermore, only municipal officials who have final policymaking authority may, by the exercise of that authority, subject the municipality to liability. The court held that whether a particular official has final policymaking authority is a question to be decided by applying state law. Finally, the Court suggested that the challenged action must have been one that falls within the area of responsibility of that official under state law.

In *Praprotnik*, this Court undertook a review of its decisions in cases involving isolated acts by government officials and employees and divergent interpretations of those principles by courts of appeals. The Court held that the identification of policymaking officials is to be decided by applying state law and that the authority to make such policy may be granted directly by a legislative enactment. The plurality in *Praprotnik* also cautioned that, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." 485 U.S. at 126.

The Ninth Circuit in this case lost sight of the nature of its task: rather than consider who has authority to make *municipal policy* – the question that this Court's precedents dictate must be asked *even when the single act of one individual is at issue* – the Ninth Circuit focused on who had *decisionmaking authority* about Mr. Webb's prosecution, as if every decision about every prosecution were *ipso facto* the making of municipal policy. In making that error, the Ninth Circuit contradicted this

Court's precedents and placed itself in conflict with many other circuits, yet simultaneously showed the need for this Court to speak more clearly as to the nature of the inquiry at issue – in essence, to complete the unfinished work of *Praprotnik*, in which there was no majority opinion. Likewise, in placing the burden of proof on the municipality to rebut the assumption that subordinates are unconstrained by their superiors, rather than placing the burden of proof on the § 1983 plaintiff to show that the subordinate and not the superior is the real policymaker, the Ninth Circuit erred and created a circuit conflict. Review of both issues is fully warranted.

I. THE COURT SHOULD REVIEW WHETHER DEPUTY PROSECUTORS ARE FINAL POLICY-MAKERS AS A MATTER OF LAW

1.a. In holding that all deputy prosecutors in Nevada are "final policymakers" (so that even their isolated actions may serve as the basis for a claim of municipal liability against the counties where they work), the Ninth Circuit relied on nothing more than a Nevada statute, NEV. REV. STAT. 252.070(1), which provides:

> All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.

This language entered the Nevada Revised Statutes by way of a 1905 amendment. Statutes of Nevada, 1905, p. 33.

The "official business" relating to the Office of the District Attorney is laid out throughout the Nevada Revised Statutes. The district attorney is the public prosecutor. NEV. REV. STAT. 252.080. He is required to attend the district courts for the transaction of criminal business. NEV. REV. STAT. 252.090. The district attorney must draw all indictments when required to do so by the grand jury, defend all suits brought against his county, prosecute the recovery of bonds, debts, fines, penalties, and forfeitures accruing to the county, draw legal papers and give written opinions on matters relating to the duties of the

governing body, bring all actions on behalf of the county for the abatement of nuisances, and perform such other duties as may be required of him by law. NEV. REV. STAT. 252.090.

The Ninth Circuit's discovery in the language of § 252.070(1) of a grant of final *policymaking* authority to *deputy* district attorneys finds no support in the statute. The correct reading of the statute is that it allows the district attorney to carry out his statutory responsibilities through deputies.

It is implausible that the language of NEV. REV. STAT. 252.070(1) creates "coextensive authority" in district attorneys and their appointed deputies as the Ninth Circuit held, especially not when it comes to *making policy*. If that were the meaning of the statute, there would be no distinction at all between a district attorney and his deputies. Each deputy would have the power to establish office – and, under the Ninth Circuit's view, therefore municipal – policy on hiring and firing, policy on budget matters, and even policy about what hours the office is to remain open.

Furthermore, at least partly as a result of its misplaced focus on *decisionmaking* authority as opposed to *policy-making* authority, the Ninth Circuit misapprehended the evidence in the record. The Ninth Circuit grudgingly conceded only that it is "conceivable" that the principal prosecutor could constrain what the court apparently viewed as the unfettered power of a deputy district attorney to act – and therefore, as the court saw it, to make municipal policy – completely independently. But, the court said, "that possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary." App., *infra*, 10a.

The Ninth Circuit's analysis does not withstand scrutiny. First, to uphold the district court's instructions, the Ninth Circuit had to conclude – and did conclude – that the question whether a deputy district attorney is a policymaker can be resolved by

looking at the bare language of state statutes, not the evidence in the record. It is unclear how a district attorney could take away from his deputies the policymaking authority that the courts below concluded the Nevada legislature has unequivocally granted to deputy district attorneys. Moreover, in this case, respondent Webb, who bears the burden of proof, offered no evidence whatsoever to show that the district attorney or the municipality constrained or did not constrain the actions of the deputy district attorneys. Webb did not call the district attorney or any municipal official in his case-in-chief, nor did he call any deputy district attorney. Rather, the defendants called Deputy District Attorney Melanie Bruketta during their case-in-chief. Ms. Bruketta was asked about the district attorney's office policy regarding prosecution and probable cause and testified unequivocally that office policy was *not* to prosecute without probable cause. See pages 6-7, *supra*.

On cross-examination, Ms. Bruketta answered "yes" when asked if the "Carson City District Attorney's Office has the power to determine who will be prosecuted." She also answered in the affirmative when asked if she had the authority to seek dismissal of a case. Her testimony is the sum of the evidence presented on the authority of deputy district attorneys in the Carson City District Attorney's Office. Contrary to the conclusion reached by the Ninth Circuit, this is evidence that deputy district attorneys in the office *are* constrained by a policy not of their own making: That prosecutions without probable cause were not permitted as a matter of the policy of the office. Far from being evidence of final policymaking authority for the municipality of Carson City, this is evidence of policy's being made by the district attorney constraining his deputies, and discretion's being granted those deputies to make decisions to proceed or not proceed with prosecutions within the bounds of the policy.

A plurality of this Court warned in *Praprotnik* against confusing policymaking authority with discretion:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose. It may not be possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance.

485 U.S. at 126-127. One of the guiding principles laid out by the *Praprotnik* plurality was that, when an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. In this case, the evidence shows at most that deputy district attorneys in the Carson City District Attorney's Office had the *discretion* to proceed or not proceed with prosecutions, constrained by the office policy of not prosecuting in the absence of probable cause. Since that is the case, it is not only conceivable that the district attorney has the power to constrain the actions of his deputies, it stands unrebutted that the district attorney has exercised his authority to do so. It is the district attorney's policy, not a subordinate's deviation from the policy, that constitutes the act of the municipality.

b. The Ninth Circuit reached the conclusion that district attorneys in Nevada have final policymaking authority based on the direction of *Pembaur* and *Praprotnik* that it look to state law for a delegation of final policymaking authority. But the Nevada statute does not address policymaking authority. And the Nevada cases relied on by the Ninth Circuit discuss the autonomy of the district attorney in his prosecutorial role, not his final policymaking authority or his power to delegate it to deputies. In *Cairns* v. *Sheriff, Clark County*, 508 P.2d 1015, 1017 (Nev. 1973), the Nevada Supreme Court held that "the matter of the prosecution of any criminal case is within the entire control of the district attorney." In *Cairns*, the plaintiff

challenged, on equal protection grounds, the decision by a prosecutor to grant immunity to one of several suspects in a narcotics case. The Nevada Supreme Court, in rejecting a petition for a writ of habeas corpus by one of the prosecuted suspects, cited NEV. REV. STAT. 252.110 for the proposition that the prosecution of any criminal case is within the control of the district attorney, and that prosecuting some, but not all the suspects, did not violate the constitutional rights of those prosecuted. Whatever that decision, it lies exclusively with the district attorney and is not subject to challenge. *Cairns,* rather than identifying a source of final authority to make municipal policy, shows the wide latitude and discretion district attorneys exercise.

Similarly, in *Lane* v. *Second Judicial Dist. Court*, 760 P.2d 1245, 1251 (Nev. 1988), the question was whether the district attorney or the district court had the authority to control the activities of a grand jury. Again, this decision has no bearing on an analysis of whether a *deputy* district attorney is vested with final *policymaking* authority for a municipality in Nevada.

The opinion below also brushes aside in a footnote the fact that the same language that applies to deputy district attorneys is used in Nevada statutes describing the powers of deputy county clerks (NEV. REV. STAT. 246.030(1)); deputy county recorders (NEV. REV. STAT. 247.040(1)); and deputy county assessors (NEV. REV. STAT. 250.060(1)). The Ninth Circuit dismissed an argument that it was creating municipal policymakers in all of these deputy county officials in Nevada by stating that it had not determined that their principals were final policymakers. Under the Ninth Circuit's analysis, however, even deputy sheriffs in Nevada become municipal policymakers. NEV. REV. STAT. 248.040(1) provides in pertinent part that each sheriff may "[a]ppoint in writing signed by him, one or more deputies, who may perform *all the duties devolving on the sheriff* of the county" (emphasis added). The Ninth Circuit offered no hint as to how it might distinguish

county clerks or sheriffs from district attorneys under the statutory scheme, and in fact, under state law, there is no distinction.

c. The effect of the Ninth Circuit's decision is not limited to Nevada or even, foreseeably, to the Ninth Circuit. In addition to Nevada, at least five States within the Ninth Circuit – Arizona, California, Idaho, Montana and Washington – have statutes that describe the powers and duties of deputy prosecutors in terms that are similar to NEV. REV. STAT. § 252.070(1). Thus, in Arizona, "each deputy of a state or county officer possesses the powers and may perform the duties prescribed by law for the office of the principal." ARIZ. REV. STAT. § 38-462(A). Furthermore, "when the official name of any principal officer is used in law conferring power, or imposing duties, liabilities or prohibitions, it includes the officers' deputies." *Id.* § 38-462(B). In like manner, Washington law provides that a "prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal." REV. CODE OF WASHINGTON § 36.27.040. And California law provides that district attorneys (as well as deputy sheriffs, deputy clerks, deputy treasurers, deputy assessors and deputy school superintendents) qualify as county officers, and it further provides that, "[w]henever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies." CAL. GOV. CODE, Title 3, § 24000, 24100.[4] Moreover, at least five States outside of the Ninth Circuit have statutes granting assistant or deputy prosecutors power to perform all the duties of the district attorney.[5]

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[4] See also IDAHO CODE, Chapter 20, §§ 31-2001, 31-2008 (listing prosecuting attorney as county officer and providing that, "[w]henever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes his deputies"); MONTANA CODE ANNOTATED, Part 24, §§ 7-4-2403, 7-4-2701 (same).

[5] See STATUTES OF MINNESOTA § 388.10; N.M. STAT. ANN. § 36-1-2; STATUTES OF NORTH DAKOTA § 11-16-02; TEX. GOV'T CODE § 41.103;

By confusing *decisionmaking* authority with *policymaking* authority, and uncritically equating *subordinate* officials with their principals, the Ninth Circuit has opened the floodgates to hold every municipality liable for every act of every low-level bureaucrat – exactly what the plurality in *Praprotnik* warned would happen if "the mere exercise of discretion by an employee" were equated with municipal policy. 485 U.S. at 126. Such a far-reaching decision, from the Nation's most populous judicial circuit, should not be allowed to stand unreviewed.[6]

The decision below, with its unquestioning reliance on state law to the exclusion of all other evidence, also goes much further than the Court contemplated in *McMillian* v. *Monroe County*, 520 U.S. 781 (1997) – and indeed is inconsistent with that decision. *McMillian* cautions that mere labels in state law may not provide a clear answer to the question of who has final policymaking authority, noting that, for example, labeling an official who makes county policy as a state official would not be dispositive on the question of whether the official was a state official protected by Eleventh Amendment immunity, or, on the other hand, an official acting on behalf of the county. *Id.* at 786. Instead, the Court stated, "our understanding of *the actual function* of a governmental official, in a particular area, will necessarily be *dependent* on the definition of the official's

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W. VA. CODE § 7-7-8.

[6] Unfortunately, the decision below is not the only recent instance of the Ninth Circuit's straying from this Court's decisions concerning municipal liability and thereby creating vast new areas of liability under 42 U.S.C. § 1983. See *Miranda* v. *Clark County, Nevada*, 319 F.3d 465 (9th Cir. 2003) (en banc) (holding that Nevada counties may be liable for litigation-related "administrative" policies of a Chief Public Defender even though deputy public defenders are not state actors under *Polk County* v. *Dodson*, 454 U.S. 312 (1981)), *petition for cert. pending*, No. 02-1629. If the Court grants the petition in *Miranda*, it should at least hold this case pending the resolution of the *Monell* issue raised in that case.

functions under relevant state law." *Ibid.* Thus, *McMillian* makes clear that state law is but one source for determining whether the "actual function" of a particular official includes the final authority to make policy for the municipality.

The difficulties that arise in making a determination about who has final policymaking authority, and even what constitutes policy, were recognized even as this Court attempted to clarify the issue in *Praprotnik*. ("We are, of course, not predicting that state law will always speak with perfect clarity." 485 U.S. at 126.) The Court also recognized that, in the absence of clear state law on the subject, difficult questions would arise where the case involved a delegation of final policymaking authority, because delegated discretion does not rise to the level of final policymaking, and in turn, the liability based on the mere exercise of discretion cannot be readily distinguished from *respondeat superior* liability.

This case offers an opportunity for this Court to revisit and attempt to come closer to drawing an "elegant line that will resolve this conundrum." *Praprotnik*, 485 U.S. at 127 (plurality opinion). In *Pembaur*, the plurality opinion observed that "[t]he fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." 475 U.S. at 481-482. There must be, in addition to discretion, a direct grant of final policymaking authority by legislative enactment or proof of a delegation by one official authorized to make final policy to another. *Id.* at 483.

Justice Powell's dissent, in which Chief Justice Burger and Justice Rehnquist joined, was prescient when applied to this case and the probable effect on other jurisdictions of the Ninth Circuit's decision. Justice Powell criticized the reliance by the Court in *Pembaur* on the *identity* of the decisionmaker as the key consideration in the search for a final policymaker. Justice Powell wrote that:

> the question whether official policy — in any normal sense of the term — has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the County Prosecutor make policy?" but rather, "did he make policy?"

Id. at 498. Justice Powell noted that the Court found state law authority for the existence of policymaking authority residing in the prosecutor, but no discussion to show that the prosecutor actually used the authority to establish official county policy in that case. In the decision below, the Ninth Circuit has gone far beyond what the dissenters feared: It has found final "policymaking" authority in a *subordinate* official purely as a matter of state law, with no concern about whether the acts complained of actually were an exercise of that policymaking authority, and with no effort to distinguish *policymaking* authority from decisionmaking discretion.

The division of the Court in *Pembaur* was unfortunately not resolved by *Praprotnik*. In another plurality decision, the Court expressed a new confidence (which soon seemed to ebb) that state law "will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business." 485 U.S. at 125. However, the plurality then outlined several scenarios in which total reliance on a state law might not fully answer the question of who has final policymaking authority. For example, the plurality again noted that the mere exercise of discretion was insufficient as a basis for siting final policymaking authority. *Id.* at 126. It held that, when an official's acts are constrained by a policy not of his own making, the policy, not the deviations from it, are the act of the municipality. *Id.* at 127. The plurality pointed out that merely going along with the discretionary decision of subordinates is not a delegation of authority to make policy. *Id.* at 130. It held that the failure of a principal to investigate the discretionary decisions of a subordinate (even if wrong) is not a delegation of authority: "In such circumstances, the purposes of [Section]1983 would not be

served by treating a subordinate employees' decision as if it were a reflection of municipal policy." *Id.* at 130. All of this analysis seems to suggest that a finding of final municipal policymaking authority may often rest on more than simply reading and interpreting state law, but on evidence in the record of whether a given official is acting to make policy.

Justice Brennan, concurring and joined by Justices Marshall and Blackmun, asserted that state law was only a starting point in determining who has final policymaking authority. Therefore, while the record showed that an official had authority to act in a certain area, there was no evidence that, when he acted, he acted with the authority to make policy. In the absence of evidence in the record to the contrary, that official was exercising discretion, not policymaking authority.

d. Unsurprisingly, the Ninth Circuit's decision to depart from this Court's precedents places it in conflict with many other circuits. Just last month, for example, a Second Circuit panel speaking through Judge Sotomayor rejected the very argument the Ninth Circuit accepted in this case, *i.e.*, that a subordinate official's authority to make decisions about how to handle *one situation* necessarily constitutes policymaking authority. *Anthony* v. *City of New York*, 339 F.3d 129 (2d Cir. 2003). A disabled woman was seized and taken to a psychiatric hospital on the order of a New York City police sergeant. She argued that the sergeant "had decision-making authority over the conduct of the officers at the scene." *Id.* at 139. A unanimous panel rejected that argument as a basis for municipal liability (*id.* at 139-140):

> Anthony does not provide any analogue to the state-law authority that a county sheriff possesses, and instead argues only that Sergeant Mendez is a final decision-maker because he had discretion to determine how to handle the particular situation at Wright's apartment. But in *Jeffes* [v. *Barnes*, 208 F.3d 49 (2d Cir.), cert. denied, 531 U.S. 813 (2000)], we explicitly rejected the view that mere exercise of discretion was sufficient to establish municipal liability.

> *See id.* at 57 ("It does not suffice for these purposes that the official has been granted discretion in the performance of his duties." (citing *St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 * * * (1988))). We accordingly reject Anthony's argument that Sergeant Mendez's order constitutes an official municipal policy.

Likewise, in *Brady* v. *Fort Bend County*, 145 F.3d 691 (1998), cert. denied, 525 U.S. 1105 (1999), the Fifth Circuit explained why an actual municipal policy – like the Carson City policy *against* baseless prosecutions shown by Deputy District Attorney Bruketta's undisputed testimony (pages 6-7, *supra*) – flatly precludes municipal liability for individual departures from that policy (145 F.3d at 698-699 (emphasis added)):

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal authority with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. * * * If county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

Accord *Triplett* v. *District of Columbia*, 108 F.3d 1450, 1453-1454 (D.C. Cir. 1997) (Williams, J.).

In *Monfils* v. *Taylor*, 165 F.3d 511 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999), a deputy chief of detectives acted unconstitutionally by allowing the identity of an anonymous tipster to become public; the mutilated body of the tipster was

then found at the bottom of a two-story vat at a paper mill, with a rope with a 50-pound weight tied to the neck of the dead tipster. Like the deputy district attorney in the present case, the deputy chief of detectives had unquestioned authority to make decisions about how to handle the situation, but the Seventh Circuit had not the slightest trouble recognizing that the city that employed him was not liable for the discrete act of a mere subordinate official. *Id.* at 517.

Because the Ninth Circuit has so badly misunderstood the inquiry consistently dictated by this Court's cases, the list of decisions of other courts of appeals with which the decision below conflicts – decisions that correctly appreciate the need to find *policymaking*, not just *decisionmaking*, authority before a municipality will be held liable – could go on and on. These illustrative decisions from the D.C., Second, Fifth, and Seventh Circuits, however, suffice to show the circuit conflict in need of this Court's attention.

2. The decision below also seriously erodes the protection afforded the prosecutorial function by absolute immunity. In his dissent in *Pembaur*, joined by Chief Justice Burger and Justice Rehnquist, Justice Powell persuasively argued that absolute immunity was necessary for the prosecutorial process, even in the context of municipal liability:

> Moreover, there is a significant cost to the unwarranted deterrence of law enforcement officials. We recognized in *Imbler* a strong state interest in "vigorous and fearless" prosecution, and found that to be "essential to the proper functioning of the criminal justice system." Those same general concerns apply to other law enforcement officials. Unwarranted deterrence has the undesirable effect of discouraging conduct that is essential to our justice system and protects the State's interest in public safety. * * * It is no answer to say that some officials are entitled either to absolute or qualified immunity. It ignores reality to say that if petitioner is successful in his $20-million suit it will

> not have a chilling effect on law enforcement practices in Hamilton County.

475 U.S. at 496 (citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)) (internal citations omitted)

In *Imbler*, this Court considered whether the same considerations of public policy that support common law immunity for prosecutors could be the basis for absolute immunity for prosecutors under § 1983. This Court, quoting from *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935), stated:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. * * * The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

424 U.S. at 422-423. The Court in *Imbler* held that these public-policy considerations justified affording prosecutors absolute immunity from suit under § 1983.[7] The court noted

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[7] Plaintiff, recognizing the existence of absolute immunity for prosecutors, did not name the district attorney or any deputy district attorney as a defendant in his complaint. Nor did he call any member of the District Attorney's Office as a witness at trial. In fact, the complaint does not allege that municipal liability for Carson City arose as a matter

that a prosecutor is duty-bound to exercise his or her best judgment in deciding which prosecutions to initiate and in conducting them. It noted that public trust in the prosecutor's office would suffer if the prosecutor's decisions were made in consideration of his or her own potential liability in a suit for damages and predicted that such suits could be expected with "some frequency" as defendants ascribed improper or malicious motives to prosecutors.

The Court also discussed practical considerations for affording absolute immunity under § 1983. The presentation of issues relating to prosecutorial conduct or misconduct in a § 1983 action would often require a retrial of the criminal offense in a new forum and the resolution of technical issues by a lay jury The Court noted that prosecutors frequently act under serious constraints of time and information and that a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation." 424 U.S. at 425-426.

The Court also recognized the systemic consequences of permitting only qualified immunity to a prosecutor. It pointed out that the goal of the criminal justice system is accurately to determine guilt or innocence and that this process requires that both the prosecution and the defense have broad discretion in the conduct of trials and the presentation of evidence. Furthermore, because the truthfulness of witnesses in criminal cases is subject to doubt both before and after they testify, if prosecutors were deterred from using such witnesses by concern about resulting personal liability, the triers of fact often would be denied relevant evidence. 424 U.S. at 426.

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of law based on a state statute; rather, the complaint alleged that the City was liable based either on a prevalent practice of retaliatory prosecution or on City ratification of the unconstitutional act of a deputy district attorney who was a policymaker. Appellee-Plaintiff's C.A. Excerpts of Record, at 78, 86-87, 94-95.

In the decision below, the Ninth Circuit did not directly diminish an individual prosecutor's individual immunity, but by creating municipal liability as a matter of law for deputy district attorneys, it opened the way for the same influences to infect the process. Now, if the decision below stands, a deputy prosecutor must consider whether his or her conduct will bring upon his or her employer liability for decisions about whether to initiate or continue a prosecution. Now, the prosecutor must be concerned about the prospect of incurring such liability for a city and currying disfavor from his employer for doing so. Now, the apprehension of liability for any failed prosecution not only could, but must, color every decision by the deputy prosecutor. What a plaintiff previously could not do directly to a deputy prosecutor, he or she can now do indirectly if the decision below stands. Conscientious prosecutors are, after all, employees of the cities and counties they serve, and must be concerned with the financial consequences of any failed prosecution.

The Court should not allow these untoward consequences to occur without review of the fundamentally flawed decision below. If *Pembaur* and *Praprotnik* have failed to make clear that it is *policymaking* authority – not mere *decisionmaking* discretion – that must be found to support municipal liability, then now is the time and this is the case to make that clear. The Nation's most populous circuit should not have a rule of law that subjects municipalities to liability so plainly unsupported by this Court's decisions.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER WHO HAS THE BURDEN OF PROVING THE EXISTENCE OF FINAL POLICYMAKING AUTHORITY

The Ninth Circuit based its determination that deputy district attorneys are final policymakers in Nevada in part on its determination that Carson City presented no evidence that the district attorney had constrained the deputies' authority. In addition to raising questions about how a district attorney might

constrain coextensive powers directly granted to his deputies by the legislature, the Ninth Circuit shifted the burden of proof from the plaintiff to the City (to show a lack of final policymaking authority on the part of deputy district attorneys where they were constrained by the policies of the district attorney). Other circuits have reversed jury verdicts when *plaintiffs* have submitted insufficient evidence of policymaking to support a finding of municipal liability.

In *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715 (4th Cir. 1999), the court applied to a private corporation the same principles applicable to lawsuits against municipalities. *Id.* at 728-729. A jury had determined that the owner of the Paramount's Kings Dominion amusement park acted unconstitutionally in arresting an African-American college student falsely suspected of having passed bad checks. The plaintiff argued on appeal that a corporate (analogous to municipal) "policy" was shown by the acquiescence of the Manager of Loss Prevention in a special police officer's "intention to effect Austin's * * * arrest on charges of forgery and uttering a forged writing." *Id.* at 729. In rejecting that argument and reversing the jury's verdict, the court of appeals relied on the fact that the *plaintiff* "presented no evidence that Hester [the alleged policymaker] had ever directed a special police officer to effect an arrest or that he had ever prevented the same." *Id.* at 730. Under the Ninth Circuit's logic in the present case, however, the burden should have been on the *defendant* to rebut the assumption that the alleged policymaker was in fact entitled to make policy for the defendant.

In *Johnson* v. *Hardin County*, 908 F.2d 1280 (6th Cir. 1990), a former prisoner persuaded a jury to hold a county liable on the theory that the elected county Jailer, Lawson, had been deliberately indifferent to his medical needs, and the court of appeals agreed that there was sufficient evidence to support a finding of deliberate indifference. *Id.* at 1284. The Sixth Circuit nevertheless reversed the judgment against the county, and directed entry of judgment for the county. The court noted

that the argument that Lawson was a policymaker was "difficult to address" because "of the lack of agreement among the members of the Supreme Court." *Id.* at 1285. Nevertheless, the Sixth Circuit discerned from this Court's rulings that the plaintiff "must have produced evidence from which a jury could reasonably conclude that Lawson was vested with final authority to set medical treatment policy for the county's prisoners." *Id.* at 1286. Because the plaintiff "introduced no evidence that indicates Lawson is vested with authority to make all of the county's medical *policy* decisions" (*id.* at 1287 n.4 (emphasis in original)), the jury verdict was reversed. Of course, under the Ninth Circuit's decision in this case, the result would have been different: deputy district attorneys have been presumed to be "policymakers" because they have statutory authority to make decisions about how to handle discrete cases, and the burden was placed on the defendant, not the plaintiff, to prove that municipal policymaking authority instead resided elsewhere.

Although these cases (and the decision below) apply state law to the question of who has final policymaking authority, *Johnson* and *Austin* rely on *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), and other decisions of this Court for the proposition that the plaintiff must present some factual basis to establish that policymaking authority rests in a given individual or that custom and usage has attained the force of law. The Ninth Circuit has dispensed with any such inquiry, and this Court's review is warranted to resolve the different approaches courts of appeals are taking to this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

DAVID Q. WEBB, Plaintiff-Appellee-Cross-Appellant,

v.

DARRIN SLOAN, ROBERT GUIMONT, ROD BANISTER, Defendants, and CARSON CITY, Defendant-Appellant-Cross-Appellee, and DOES 1-10 inclusive, Defendants,

Nos. 01-16855, 02-16253

Argued and Submitted March 10, 2003.*
Resubmitted April 21, 2003.
Filed May 29, 2003.

Appeals from the United States District Court
for the District of Nevada.
D.C. No. CV-97-00673-ECR.
Edward C. Reed, Jr., District Judge, Presiding.

Before Kozinski, Graber, and Berzon, Circuit Judges.

GRABER, Circuit Judge:

Plaintiff David Q. Webb obtained an $ 80,000 jury verdict in this civil rights action against Carson City, Nevada, after he was prosecuted without probable cause for obstruction of justice. His lawyers were awarded fees. In this opinion, we resolve two appeals: Defendant Carson City's appeal from the

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* This panel unanimously finds case No. 02-16253 suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

adverse verdict, and the separate appeal resulting from a challenge to the fee award by Plaintiff's counsel.

In Carson City's appeal, we hold that deputy district attorneys are final policymakers in Nevada for purposes of establishing municipal liability under 42 U.S.C. § 1983. As a result of our holding, we affirm the jury's verdict.

We reverse and remand on the appeal by Plaintiff's lawyers because the district court applied an incorrect legal standard in computing the fee.[1]

FACTUAL AND PROCEDURAL HISTORY

A. *Facts*[2]

On June 27, 1997, Deputy Darrin Sloan chased a car into the parking lot of the Carson City Inn. At the time of the pursuit, radio traffic identified the owner of the car as Freddy Little. The driver, who was African-American, got out of the car, and Deputy Sloan continued the chase on foot. After leaping over several fences in pursuit, Deputy Sloan lost track of the suspect. He then returned to the abandoned car and began an inventory.

During the next 20 minutes or so, the police received several reports that an African-American man was running through areas near the Inn. Sloan's supervisor, Sergeant Moltz,

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[1] In a separate memorandum disposition, we resolve Plaintiff's cross-appeal, which challenges various rulings by the trial court.

[2] "With respect to those parties in favor of whom the jury returned verdicts, we view the evidence in the light most favorable to each prevailing party." *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 847-48 (9th Cir. 1999). In other words, we view the facts in the light most favorable to Plaintiff as against Carson City, but in the light most favorable to Deputy Sloan as against Plaintiff.

saw an African-American man suddenly jump from some bushes and run through the parking lot of the *Nevada Appeal* newspaper's offices. Shortly thereafter, another officer, Deputy Guimont, found Plaintiff David Q. Webb, an African-American man, lying on the ground behind a vehicle parked in an adjoining parking lot. Deputy Guimont detained Plaintiff at gunpoint and waited for Deputy Sloan's arrival.

Deputy Sloan arrived at the location where Deputy Guimont had detained Plaintiff. He noticed that Plaintiff's clothing did not match that of the man whom he had been chasing, but that Plaintiff did have a similar black bag. Sloan asked Plaintiff, "Why were you driving Freddy Little's car?' Plaintiff responded that he did not know who Freddy Little was. The deputies arrested Plaintiff for various traffic offenses and for obstructing police officers.

On July 3, 1997, another police officer told Sloan that Freddy Little had been bragging that he had outrun the cops on June 27, 1997. Either the next day or the next business day, Sloan informed District Attorney Melanie Bruketta that he no longer believed that Plaintiff was the person whom he had been chasing on June 27. In a supplemental report, Sloan likewise wrote that he no longer believed that Plaintiff was the person who was driving the car that he had been chasing.

Despite Sloan's timely advisement, Plaintiff was not released from jail until July 16. Nor did the district attorney's office drop any of the charges. On August 15, 1997, Plaintiff met with a deputy district attorney, Ray Oster. Oster told Plaintiff that, if he pleaded guilty to the obstruction charge, Oster would drop the traffic charges. Plaintiff refused. A week later, the district attorney's office dropped the traffic charges anyhow but proceeded with the obstruction charge.

Chief Deputy District Attorney Anne Langer took over prosecution of the obstruction charge. On September 3, 1997,

Langer offered to drop the obstruction charge if Plaintiff signed a waiver of civil liability. Plaintiff again refused. In a later chance meeting, Langer assured Plaintiff that she would prosecute him to conviction on the obstruction charge. Plaintiff later testified that Langer had told his lawyer that she was prosecuting him because he refused to sign the waiver.

In October of 1997, Plaintiff went to trial on the obstruction charge. At the trial, Deputy Sloan testified that Plaintiff had done nothing to delay him in performing his duties. Deputy Guimont similarly testified that Plaintiff had not obstructed the police. Plaintiff was acquitted.

B. *Procedural History*

Shortly after his acquittal, Plaintiff filed a complaint containing nine claims for relief under both federal and state law.[3] Defendants moved for dismissal or, in the alternative, for summary judgment. The motion was denied for all claims but one. Defendants appealed, seeking review on the issue of qualified immunity. Plaintiff responded to the appeal and filed a motion to certify the appeal as frivolous. The district court denied certification, and this court dismissed the appeal for lack

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[3] Against all Defendants, Plaintiff alleged (1) a violation of his First Amendment right to seek redress from the courts, due to Langer's offer to drop the charges in exchange for a waiver of all civil claims; (2) a violation of the Fourth Amendment's prohibition against unlawful seizure, due to his arrest, imprisonment, and subsequent prosecution; (3) a general violation of Plaintiff's civil rights caused by Defendants' initiation and pursuit of prosecution without probable cause; (4) a conspiracy to commit those federal civil rights violations; (5) false arrest, abuse of process, and malicious prosecution under state tort law; (6) intentional infliction of emotional distress; (7) a claim for "declaratory relief"; and (8) a general due process violation. Against Defendants Banister and Carson City, Plaintiff alleged a failure to train officers.

of jurisdiction. Plaintiff's motion for interim fees was also denied.

Plaintiff then moved for summary judgment, which was denied. The case proceeded to trial when settlement efforts failed.

The jury found in favor of Deputy Sloan on all counts, but in favor of the Plaintiff as against Carson City. In special interrogatories, the jury found that Defendant Carson City had a custom, policy, or practice that violated Plaintiff's federal constitutional right not to be prosecuted without probable cause, and that Carson City has a "custom, policy, or practice to falsely imprison individuals." The jury found that Deputy Sloan did not falsely arrest Plaintiff but that Carson City falsely imprisoned, maliciously prosecuted, and committed abuse of process against Plaintiff under state law. The jury awarded Plaintiff $80,000 without apportionment among the separate claims.

Plaintiff's counsel, the law firm of Cooke Story, Ltd., moved for an award of attorney fees in the amount of $188,115.66. The district court awarded fees but determined that the total amount should be $ 95,507.25: $ 78,450 for work performed by Cooke Story and $ 17,057 for work performed by Plaintiff's previous lawyer, Terri Keyser-Cooper.

Carson City timely appeals the decision that municipal liability may attach for the actions of deputy district attorneys. Carson City also argues that it enjoys sovereign immunity for the discretionary decisions of district attorneys under Nevada Revised Statute ("NRS") § 41.032(2).

Cooke Story timely appeals the district court's decision to award a lower fee than it requested. Keyser-Cooper does not appeal her portion of the fee award, however.

DISCUSSION

A. *Municipal liability under § 1983 is proper in this case because the deputy district attorneys were acting as final policymakers for Carson City in deciding whether to prosecute Plaintiff.*[4]

1. *There are two ways to establish municipal liability under § 1983, in addition to express adoption of an unconstitutional policy.*

Section 1983 provides that "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . or other proper proceeding for redress." 42 U.S.C. § 1983. "Congress intended the term 'person' to include municipalities," such as Carson City. *Christie v. Iopa*, 176 F.3d 1231, 1234 (9th Cir. 1999).

Nevertheless, municipal liability under § 1983 cannot be founded on a theory of respondeat superior. *Gibson* v. *County of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002), cert. denied, 154 L. Ed. 2d 775, 123 S. Ct. 872 (2003). "Congress intended to hold municipalities liable only when 'action pursuant to official municipal policy of some nature caused a constitutional tort.'" *Christie,* 176 F.3d at 1235 (quoting *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). Generally, then, the actions of individual employees can support liability against a municipality under § 1983 only if those employees were acting pursuant to an official municipal policy. *See Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 479, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986)

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[4] We review de novo a district court's decision to deny immunity to a municipality in a § 1983 action. *Cortez* v. *County of L.A.*, 294 F.3d 1186, 1188 (9th Cir. 2002).

(stating that "the 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality").

As we explained in *Christie*, a municipality still may be liable even if it does not expressly adopt the alleged policy. 176 F.3d at 1235. There are two alternative ways such liability can attach. First, if an employee commits a constitutional violation pursuant to a long-standing practice or custom, the employee's act is sufficient to support municipal liability. *Id.* By contrast, "[a] single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom." *Id.* A municipality can be liable even for an isolated constitutional violation, however, when the person causing the violation has final policymaking authority. *Id.*

As to the first alternative, Plaintiff must prove the existence of a longstanding practice or policy to the satisfaction of the fact-finder. *Trevino* v. *Gates,* 99 F.3d 911, 920 (9th Cir. 1996) ("Normally, the question of whether a policy or custom exists would be a jury question."). On the other hand, when the issue concerns a single constitutional deprivation under the second alternative, the court must decide, as a matter of state law and before the case may be submitted to the jury, whether the person who committed the violation had final policymaking authority. *Christie,* 176 F.3d at 1235.

Plaintiff argues that he proved *both* that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent *and* that municipal liability is proper in this case because the deputy district attorneys were acting with final policymaking authority. Because we agree with the second argument, a question that we previously left open, *Herb Hallman Chevrolet, Inc.* v. *Nash-Holmes,* 169 F.3d 636, 645 (9th Cir. 1999), we need not reach the first.

2. *Deputy district attorneys in Nevada have final policymaking authority for the municipality.*

In Nevada, the legislature confers final policymaking authority on principal prosecutors and confers that *same* authority directly on deputies. NRS § 252.070(1) provides: "All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals."

By its plain text, that statute confers authority on deputy district attorneys that is coextensive with the authority enjoyed by principal district attorneys. Thus, if principal district attorneys are final policymakers, then so are their deputies.

Whether the principal prosecutor has final policymaking authority is easily resolved. The Nevada Constitution does not create the office of the district attorney. *Lane* v. *Second Judicial Dist. Court,* 104 Nev. 427, 760 P.2d 1245, 1251 (Nev. 1988). Rather, the state's constitution confers the power to do so on the legislature. Nev. Const. art. 4, § 32. Pursuant to that power, the legislature statutorily created the office and prescribed its duties. *Lane,* 760 P.2d at 1251; Nev. Rev. Stat. § 252.110. The Nevada Supreme Court has noted that "the matter of the prosecution of any criminal case is within the *entire control* of the district attorney." *Cairns* v. *Sheriff, Clark County,* 89 Nev. 113, 508 P.2d 1015, 1017 (Nev. 1973) (per curiam) (emphasis added). Thus, in Nevada, principal district attorneys "are final policymakers for the local government in a particular area, or on a particular issue." *McMillian* v. *Monroe County,* 520 U.S. 781, 785, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997). Specifically, Nevada district attorneys are final policymakers in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute.

The state attorney general exercises *supervisory* power over county district attorneys, but this does not remove final

policymaking authority even from principal district attorneys. As pertinent here, NRS § 228.120(2) provides that the attorney general *may*:

> Exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

Both this court and the Nevada Supreme Court, however, have emphasized the discretionary and permissive nature of that authority. "The power to 'supervise' a district attorney which is granted to the attorney general by NRS 228.120(2), means supervision and cannot sensibly be read as a grant of power to usurp the function of the district attorney." *Ryan* v. *Eighth Judicial Dist. Court,* 88 Nev. 638, 503 P.2d 842, 844 (Nev. 1972). "'The tenor of these statutory provisions is that with respect to the general run of prosecutions in the various counties of Nevada the attorney general of Nevada has no duties and responsibilities. His authority concerning supervision of district attorneys is permissive and discretionary.'" *Houston* v. *Bryan,* 725 F.2d 516, 519 (9th Cir. 1984) (quoting with approval the district court's decision below). In the light of these authorities, and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power, we hold that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions.

As previously stated, the Nevada legislature confers the same final policymaking authority on deputy district attorneys. Nev. Rev. Stat. § 252.070(1). The principal does not delegate constrained discretion to a deputy upon appointment. Rather, the legislature states that, upon appointment, deputies may transact all official duties *to the same extent as* their principals.

We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary.

In *Christie*, we held that deputy prosecutors in Hawaii did not have final policymaking authority, a holding on which Carson City relies. 176 F.3d at 1237-38. That case is distinguishable in fundamental ways, however.

There, it was clear that the chief prosecutor had final policymaking authority. *Id.* at 1238. The Hawaii charter gave principal prosecutors the authority to appoint deputies, but did not describe the authority that those deputies would enjoy to make decisions or to choose among alternatives. *Id.* at 1237.

Accordingly, *Christie* framed the question as whether the chief prosecutor had delegated that authority to deputy prosecutors. *Id.* at 1236. That was a hard question, because to avoid imposing respondeat superior liability we had to ascertain the precise degree to which a principal delegates authority. *Id.* Here, however, the legislature directly delegates coextensive authority to the principal prosecutor and the deputies.

In *Christie*, we found it significant that "if [the deputy prosecutor] disagreed with [the principal prosecutor's] decision to prosecute Plaintiffs, she had to contact [the principal prosecutor]; she could not decide unilaterally to drop the case." *Id.* at 1238. By contrast, Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against Plaintiff without consulting with any supervisor.

Because of the distinctions between Nevada's deputy district attorneys and the Hawaiian deputy prosecutors in *Christie*, *Christie* does not control the outcome of this case. The district court correctly held that deputy district attorneys in Nevada are final policymakers whose actions can be the acts of the municipality for the purposes of attaching liability under § 1983.[5]

B. *We need not reach Carson City's state-law immunity claim because the verdict can rest on a valid federal ground.*

Citing NRS § 41.032(2), Carson City argues that deputy district attorneys enjoy immunity for their discretionary acts. We need not reach this issue. If the immunity defense is viable, then the state claims were submitted to the jury in error. The federal claims, however, remained valid.

Sometimes, a jury's verdict may stand on a legally viable theory even if a legally defective theory also was presented. As explained in *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 62 F.3d 280, 285-86 (9th Cir. 1995):

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[5] The Nevada Public Agency Insurance Pool, as amicus, argues that this holding will expose Nevada's municipalities to heavy liability. The same statutory text gives co-extensive authority to deputy county recorders, deputy county clerks, and deputy county assessors. We are not persuaded that our holding will have the crushing effect that amicus urges. First, our holding does not address whether the principals who hold those other positions are final policymakers for municipalities. If a county recorder is not a final policymaker, then a deputy county recorder exercising coextensive authority is not a final policymaker. Second, it is within the Nevada legislature's power to constrain the authority of deputies if it should see fit.

> Our analysis of the viability of the plaintiff's theories . . . leaves us with a situation in which one of the theories submitted to the jury was legally defective. "As a general rule, 'a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury.'" *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (quoting *Syufy Enters.* v. *American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986), cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876, and cert. denied, 479 U.S. 1034, 93 L. Ed. 2d 838, 107 S. Ct. 884 (1987)). An exception to this rule exists, however, when we are able to construe a general verdict as attributable to a theory submitted to the jury that was viable . . . . In deciding whether to exercise this discretion, the factors we consider are: "(1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories." *Id.* (citing *Traver* v. *Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980)).

(Parallel citations omitted.)

A consideration of the relevant factors in this case weighs in favor of affirming the full jury award on federal grounds:

First, the verdict eliminates any concern about jury confusion. Instead of the general verdict entered in *Portland Feminist*, the jury answered special interrogatories explaining on which theories it found in Plaintiff's favor and on which it did not. The special interrogatories identify which answers refer to the federal claims and which refer to the state claims.

Because of the special interrogatories, there is no danger that the jury found liability *only* on a legally defective theory. The only aspect of the verdict that is "general" is the damages award, which was not apportioned among the claims.

Second, the defense of sovereign immunity under NRS § 41.032(2) applies only to the state-law claims, not the federal claims. Thus, there is a clear delineation between the legally viable theories and the theories that we assume to be legally infirm.

The third and fourth factors are related, and both weigh in favor of affirming the full award. The evidence is certainly strong enough to support the jury's reasonable damages award based solely on the federal claims. Furthermore, the evidence supporting the federal and state claims was the same. The state claims were simply another means of seeking redress for the same injuries that arose out of the same common core of facts.

Application of these four factors persuades us that the verdict here is distinguishable from the one in *Portland Feminist*. The special interrogatories provide a sufficient record to allow us to affirm the verdict even if Nevada can claim immunity for the state-law claims.

C. *The district court applied an incorrect legal standard and, as a consequence, excluded related claims in computing the fee.*[6]

Under 42 U.S.C. § 1988, the district court may, in its discretion, award attorney fees to a prevailing party in an action brought under § 1983. The district court agreed that Plaintiff was a prevailing party, but awarded less than Cooke Story had

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[6] We review for abuse of discretion a district court's decision to award fees to a prevailing party in a civil rights action. *Hensley* v. *Eckerhart,* 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

requested. The court reduced the fee award for three reasons. *First*, it excluded time spent on three motions that Plaintiff did not win: a motion to certify as frivolous Defendants' interlocutory appeal of the court's qualified immunity decision, a motion for interim fees, and a motion for partial summary judgment. *Second*, the court reduced the number of hours by 25 percent to reflect Plaintiff's limited success. Third, after concluding that counsel spent too much time challenging Defendants' interlocutory appeal, the court reduced the number of hours for which fees would be awarded on that issue. Although the district court did not err in applying the second step in *Hensley* v. *Eckerhart,* 461 U.S. 424, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), when it made the second and third adjustments, *see infra* p. 7104, we reverse and remand the fee award because the district court used an incorrect legal standard in deciding what issues were "unrelated" to the successful claims.

The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees" under § 1988. *Hensley, 461 U.S. at 440.* As we explained in *Sorenson* v. *Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001), there is a two-step process for determining the appropriate reduction for "limited success":

> The first step is to consider whether "the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded." [*Hensley,* 461 U.S.] at 434. Claims are "unrelated" if they are "entirely distinct and separate" from the claims on which the plaintiff prevailed. *Odima* [v. *Westin Tucson Hotel,* 53 F.3d 1484, 1499 (9th Cir. 1995)]. Hours expended on unrelated, unsuccessful claims should not be included in an award of fees.
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> . . .
>
> The second step of the *Hensley* analysis is to consider whether "the plaintiff achieved a level of success that

> makes the hours reasonably expended a satisfactory basis for making a fee award." [461 U.S.] at 434. In answering that question, a district court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."
>
> *Id.* A plaintiff may obtain excellent results without receiving all the relief requested. *Id.* at 435 n.11.

(Parallel citations omitted.) The district court reduced the Plaintiff's fee at both steps of this two-step analysis.

At the first step, the court determined which claims had succeeded and which claims had failed. The court noted that Plaintiff was unsuccessful on his claims for false arrest and failure to train. The court nonetheless allowed fees for work done on those two claims because it found them related to the claims on which Plaintiff did prevail. In this respect, the court did not err.

The court also relied on the fact that "Plaintiff was unsuccessful on his motion to certify the appeal as frivolous, his claim for interim attorney's fees, and his motion for summary judgment." The court deducted the hours that Cooke Story claimed were spent preparing for those portions of the case. The court erred in analyzing whether those three motions were "unrelated" to the claims on which Plaintiff ultimately prevailed.

The district court erred because it misconstrued our precedents when it applied a strict two-step test -- (1) are there common facts *and* (2) are there related legal theories -- to determine the relatedness of claims. We do apply a two-step test to determine how to reduce an award for limited success,

but we have not adopted a similar test for relatedness. Echoing the Supreme Court's description of related-claim cases, we have said that related claims involve a common core of facts *or* are based on related legal theories. *Hensley,* 461 U.S. at 435; *Cabrales* v. *County of L.A.,* 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated*, 490 U.S. 1087, 104 L. Ed. 2d 982, 109 S. Ct. 2425 (1989), and *reinstated*, 886 F.2d 235 (9th Cir. 1989). Often, related claims involve both a common core of facts and related legal theories. *See, e.g., Sorenson,* 239 F.3d at 1147. However, contrary to the district court's understanding, we have not *required* commonality of both facts *and* law before concluding that unsuccessful and successful claims are related.

In *Schwarz* v. *Secretary of Health & Human Services,* 73 F.3d 895, 902-03 (9th Cir. 1995), we examined our cases concerning "relatedness" in fee awards. We acknowledged that the test for relatedness of claims is not precise. *Id.* at 903. However, we offered some guidance, explaining that "the focus is to be on whether the unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." *Id.* We explained that claims are *unrelated* if the successful and unsuccessful claims are "distinctly different" *both* legally *and* factually. *Id.* at 901, 902. Again echoing *Hensley*, we reasoned that such hours are excludable because work on such distinctly different claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 901 (quoting *Hensley,* 461 U.S. at 435 (internal quotation marks omitted)). We cited cases in which we asked "whether it is likely that some of the work performed in connection with the unsuccessful claim also aided the work done on the merits of the successful claim." *Id.* at 903 (brackets and internal quotation marks omitted). Ultimately, however, we reaffirmed that the focus is on whether the claims arose out of a common course of conduct. *Id.* In short, claims may be related if either the facts *or* the legal theories are the same.

Plaintiff asserted numerous legal theories against several defendants. However, all his claims arose out of a common core of facts and a common course of conduct: Plaintiff's arrest, detention, and prosecution. In such a situation, we cannot say that the claims the district court excluded were "entirely distinct and separate" from the successful claims. *Sorenson,* 239 F.3d at 1147 (internal quotation marks omitted).

For example, Plaintiff's motion for summary judgment, although unsuccessful, was not wholly unrelated to the claims on which he succeeded. Plaintiff sought summary judgment on his federal and state claims for false arrest, false imprisonment, and malicious prosecution. Plaintiff ultimately prevailed on his false imprisonment and malicious prosecution claims. As the district court itself concluded, the claim for false arrest is unquestionably related to the two successful claims. Even though the summary judgment motion failed, work done to prepare the motion on those theories could have contributed to the final result achieved. In other words, the district court should not have excluded all work on the motion on the ground that it was "unrelated."

To be sure, at least one claim in the summary judgment motion asserted a separate legal theory that was not tied to the facts. Plaintiff claimed that the obstruction statute facially violated the *First Amendment* because of its overbreadth. The hours spent preparing that claim properly may be excluded. However, the district court should exclude the hours spent on that claim only if those hours can be isolated. *Hensley* recognized that work on different aspects of a case often overlaps, and that "much of counsel's time will be devoted generally to the litigation as a whole." 461 U.S. at 435. If it is impossible to isolate the truly unrelated claims from those related claims, the district court should instead reflect that limited success in *Hensley*'s second step: the significance of the overall relief in relation to the hours reasonably expended on the litigation. *Sorenson,* 239 F.3d at 1147.

As for *Hensley's* second step, the district court applied the proper analysis. Plaintiff initially sued several defendants, but prevailed against only one: Carson City. A discretionary reduction to reflect that kind of limited success is appropriate. *See Corder* v. *Gates,* 947 F.2d 374, 379-80 (9th Cir. 1991) (stating that a full-fee award to a plaintiff who prevails against only one among many defendants encourages litigation in a manner that Congress did not intend).

In addition, on the ground that the billing was excessive, the court reduced by half the 71.5 hours that Cooke Story claimed it took to prepare a motion to dismiss Defendants' interlocutory appeal. This was the same appeal that Cooke Story claimed below should be certified as frivolous. The district court apparently agreed that the issue demanded little of counsel's time. The court did not abuse its discretion in making this reduction.

We recognize that a reduction in the requested fees is appropriate in view of Plaintiff's limited success and the court's conclusion that some of the hours billed were excessive. Because the district court applied the wrong standard for relatedness, however, we must reverse and remand so that the court may reexamine Cooke Story's fee application in view of the correct legal standard.[7]

AFFIRMED in case No. 01-16855. REVERSED and REMANDED in case No. 02-16253.

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[7] We note again that Keyser-Cooper does not appeal her portion of the fee award, so that award should remain unchanged.

APPENDIX B

United States Court of Appeals,
Ninth Circuit.

DAVID Q. WEBB, Plaintiff--Appellant,
v.
DARRIN SLOAN; ROBERT GUIMONT; ROD BANISTER; CARSON CITY; and DOES 1-10 inclusive,
Defendants--Appellees.
No. 01-16969.

Submitted March 10, 2003.*

Resubmitted April 21, 2003.
Decided May 29, 2003.

Appeal from the United States District Court for the District of Nevada, Edward C. Reed, Jr., District Judge, Presiding.
D.C. No. CV-97-00673-ECR.

Before: KOZINSKI, GRABER, and BERZON, Circuit Judges.

MEMORANDUM**

Plaintiff David Q. Webb obtained an $80,000 jury verdict in this civil rights action against Carson City, Nevada, after he was prosecuted without probable cause for obstruction of justice. Defendant Carson City appealed in case No.

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* This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

01-16855; Plaintiff cross-appealed, filing a pro se brief that alleges 12 claims of error. We resolved Carson City's claims in a separate published opinion.

Plaintiff's first claim alleges unlawful arrest. Construing this allegation either as a challenge to the jury's verdict in favor of Deputy Sloan, or as a challenge to the district court's ruling on the Rule 50(a) motion in favor of Carson City, it must fail.

Plaintiff's version of the arrest and Deputy Sloan's version of the arrest conflicted. The jury accepted Deputy Sloan's version of events, which was supported by substantial evidence. *See Hines* v. *Gomez,* 108 F.3d 265, 267 (9th Cir.1997) (stating standard of review).

Similarly, the district court correctly granted the Rule 50(a) motion on behalf of Carson City on the theory that municipal liability could not attach for the isolated action of a police officer in the field. Plaintiff presented no evidence to show that street patrol officers are final policymakers for the municipality. The district court's directed verdict was proper because no reasonable jury could have found for Plaintiff with respect to that issue. *See Montiel* v. *City of L.A.,* 2 F.3d 335, 342 (9th Cir.1993) (stating standard of review).

The next claim of error is that Defendants falsely imprisoned Plaintiff despite their knowledge of the true suspect. This claim cannot support reversal, because Plaintiff prevailed on this claim at trial.

Next, Plaintiff argues about intentional infliction of emotional distress. Plaintiff conceded below that Defendants were entitled to judgment as a matter of law on this issue. Therefore, he may not revive the claim on appeal.

The remaining arguments concern mistakes allegedly made by Plaintiff's counsel below. Plaintiff did not object to

any of those acts at trial and so has waived them. *Doi* v. *Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir.2002). In any event, in this civil case Plaintiff is bound by the alleged errors and omissions of his own counsel. *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Plaintiff has no right to counsel in this § 1983 action; thus, he has no right to effective counsel. *Nicholson* v. *Rushen*, 767 F.2d 1426, 1427 (9th Cir.1985) (per curiam).[1]

AFFIRMED.

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[1] We note, however, that the verdict in Plaintiff's favor seems evidence enough that in fact he had effective counsel despite his complaints.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID Q. WEBB,	)
	)
Plaintiff,	)
	) Case No. CV-N-97-763-
	) ECR (PHA)
v.	)
	) MEMORANDUM
DARRIN SLOAN, et al.,	) DECISION AND
	) ORDER
Defendants.	)
	)

This matter is before the Court on Defendants' Motion to Dismiss or In The Alternative, For Summary Judgment (Doc. #18). The Plaintiff, David Webb, appearing pro se, has opposed the motion (Doc. #32) and the Defendants have replied (Doc. #33). The motion is ripe for decision.

BACKGROUND

This action was initiated by Webb who was then represented by counsel. Webb was arrested on the evening of June 27, 1997, and charged with obstructing officers and various misdemeanor traffic violations. According to the complaint, Deputy Sheriff Darrin Sloan was in hot pursuit of a vehicle driven recklessly by Freddie Little. Little was apparently identified as the suspect on a dispatch tape of the pursuit. Both Webb and Little are African-American males. At about 9:00 p.m., the approximate time of the pursuit, Webb was walking along a street in Carson City when he observed six to eight uniformed deputies approaching with weapons drawn as evidenced by red laser beams shining on the side of a nearby

building. Webb was frightened by this development and ducked down to avoid being shot. When the deputies came upon Webb, they ordered him to come forward and placed him under arrest, handcuffing him. When Webb asked why he was being arrested, he was directed to "shut up."

While he was being arrested, Webb contends that another officer informed defendant Deputy Guimont that he was not the right man. It is alleged by the plaintiff that the real suspect. Freddie Little, had been arrested several times in Carson City and was well known to the defendants. When asked by the deputies if he knew Little, Webb said he did not. Webb was taken to the Carson City jail and booked on misdemeanor charges of reckless driving, driving with no valid driver's license, no proof of insurance, and obstructing officers in the performance of their duties. With bail set at $1700, Webb, who is unemployed, remained in jail. He was arraigned on June 30, pleaded not guilty and was denied release on his own recognizance (OR).

Three days later, on July 3, 1997, defendant Deputy Sloan filed a continuation report stating that he did not believe that Webb was the driver of the vehicle Sloan had been chasing on June 27. This report was made on the basis of an informant's report that Freddie Little was bragging around town that he had eluded the deputies on the evening of Webb's arrest. Webb remained in jail. Nearly two weeks later, Webb was finally released on an OR but the charges remained against him. Nearly one month later, on August 15,1997, a deputy district attorney met with Webb offering to dismiss the traffic charges if Webb would plead guilt to the obstruction charge. Webb declined the offer. On August 22, 1997 the traffic charges were dismissed "in the interests of justice." The obstructing charge remained.

According to the complaint, on September 2, 1997, Webb's attorney conveyed an offer made by Chief Criminal

Deputy District Attorney Anne Langer, wherein she agreed to dismiss the obstruction charge if Webb would sign a waiver of his right to sue the defendants in a civil action. Allegedly, Langer insisted that if Webb refused the deal, prosecution of the obstructing charge would be vigorous and aggressive. Webb again declined the D.A.'s terms. After several continuances, on October 30,1997, Webb was tried and acquitted on the obstruction charge. He filed this action a month later.

Procedural History

The Complaint in this action was filed November 26, 1997 naming the individual defendants in both their personal and official capacities. It sets out claims under the First Amendment for unlawful prosecution in retaliation for Webb's refusal to waive his right to "protest official misconduct," and the Fourth Amendment for unlawful seizure by conducting an unreasonable and insufficient detention, search, and investigation, by providing false, misleading, or incomplete information in official or court proceedings, and by failing to provide exculpatory information to the prosecuting attorney. Webb also contends his civil rights were violated by Defendants' initiation and pursuit of prosecution without probable cause. He claims Defendants Banister and Carson City are liable for their failure to properly train the arresting deputies; alleging a policy or practice in this regard. Webb finally alleges a conspiracy among the defendants in violation of federal statutes, along with three additional claims founded on state law, invoking this Court's pendent jurisdiction.

In February, 1998, the defendants answered and a joint stipulated discovery plan was filed in April, which was granted with modification by the Court. Thereafter, the Court granted a 60 day extension for discovery to December 9, 1998. One month prior to the close of discovery, Webb's counsel moved to withdraw citing an irreparable breakdown of communication. The motion was granted and thereafter Webb appeared pro se.

A pre-trial notice order was entered on February 4,1999. Defendants then moved for permission to extend the deadline for dispositive motions, citing Webb's failure to respond to discovery and asserting that uncontroverted facts were present to support a motion to dismiss. The extension was granted and the defendants' Motion to Dismiss or In The Alternative For Summary Judgment (Doc #18) was filed in February 1999. Following numerous letters from Webb to the Court seeking a stay of the action and then extensions of time to respond, Webb finally provided the Court with a letter which was construed as a response to the motion to dismiss and it filed as such on June 29, 1999, (Doc #32).

DISCUSSION

The defendants seek dismissal of the complaint on the basis of a failure to prosecute or because Webb fails to state a claim. Alternatively, they seek summary judgment either on the merits or based on qualified immunity for the deputies' discretionary acts. The motion is accompanied by three exhibits including Deputy Sloan's answers to interrogatories, a copy of a computer generated docket of Webb's criminal matter, and another computer generated document showing Webb's release from jail. The response filed by Webb is his sworn statement of "the actual events that took place on Friday, 27 June 1997:"

LEGAL STANDARDS

The Motion to Dismiss

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the nonmoving party: *Russell* v. *Landrieu,* 621 F.2d 1037 (9th Cir. 1980). A dismissal under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on. a question of law. *North Star Inter'l* v. *Arizona Corp. Comm.,* 720 F.2d 578

(9th Cir. 1983). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet* v. *Wand Investment* Co., 672 F.2d 1305 (9th Cir. 1982).

Defendants argue that Webb's complaint should be dismissed for failure to prosecute the action contending that Webb failed to provide any response to discovery requests they propounded and that he is in violation of the Federal Rules of Civil Procedure 41(b) and Local Rules of Practice 41-1, which allows for dismissal if a matter is pending for more than nine months without "any proceeding of record having been taken." This particular argument is not persuasive since a review of the docket sheet shows regular activity in the matter, even after the withdrawal of Webb's attorney. Defendants argue that Webb has done nothing of substance in pursuing his case since the filing of the joint discovery plan in April 1998. It seems disingenuous for Defendants to make this argument since they were participants in the various stipulated extensions filed between April, 1998 and November, 1998. Additionally, Defendants have made no apparent efforts to enforce Webb's cooperation in responding to Discovery requests and even they missed the deadline for filing dispositive motions, thereafter seeking leave of the Court to file the instant motion.

The defendants' argument under rule 12(b)(6) also fails for two reasons. First, Webb's allegations, taken as true and in a light most favorable to him, clearly state claims upon which relief could be granted. Second, Defendants' motion relies heavily on matters outside the pleadings, including the answers to interrogatories made by defendant Sloan to support their view of the facts. Their reliance on other evidence and on the summary judgment standards in their remaining arguments and the Court's consideration thereof foreclose a simple dismissal.

Summary Judgment

In the face of a motion for summary judgment, the allegations of the complaint are again viewed in a light most favorable to the plaintiff, *Adickes* v. *S .H. Kress and Co.,* 398 U.S. 144, 157 (1970), and it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet* v. *Wand Investment Co.*, 672 F.2d 1305 (9th Cir. 1982). Summary judgment is proper "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

Defendants' motion asserts that they should prevail as a matter of law because "it is undisputed that" (1) the deputies were authorized by law to arrest Webb; (2) the deputies had legal cause to arrest Webb; (3) the deputies had probable cause to arrest Webb, defeating any constitutional claim he makes; and (4) the deputies are entitled to qualified immunity irrespective of the presence of probable cause. Additionally, they assert that there is no evidence to support the claim that Carson Cite is liable based on a custom or policy regarding the training of the deputies. And finally, Defendants suggest that all the remaining claims are based on state law and should be dismissed in light of Webb's inadequate federal claims and on the basis of sovereign immunity. Even in the face of these arguments, summary judgment shall not be granted on all claims.

In their motion, Defendants argue the facts are undisputed. Once the movant presents evidence which, *if uncontroverted,* would entitle them to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). There is no

genuine issue of material fact if the party opposing the motion 'fails to make an adequate showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Taylor* v. *List,* 880 F.2d 1040,1045 (9th Cir. 1989) *quoting Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322 (1986). Following numerous continuances to accommodate his attempts to obtain counsel, Webb provided the Court with a statement sworn to be true and setting out what transpired on the evening of June 27,1997, and thereafter until his trial on October 30,1997. His statement contains no legal citation or points and authorities as required by the local rules of practice (and noted by Defendants in their reply as a basis for granting their motion). It is not supported by independent documentation or other evidence, although Webb suggests that affidavits from various named witnesses would support him. In the spirit of liberal construction required for pro se litigants, the response can be taken as intended and the mentioned technical inadequacies may be overlooked. *Haines* v. *Kerner,* 404 U.S. 519 (1972) (per curiam).

THE CLAIMS FOR RELIEF

Retaliatory Prosecution

The right of access to the courts is subsumed under the First Amendment right to petition the government for redress of grievances. *See, e. g, California Motor Transp. Co.* v. *Trucking Unltd.* 404 U.S. 508, 510 (1972); *Harrison* v. *Springdale Water & Sewer Comm'n,* 780 F.2d 1422,1427 (8th Cir. 1986). Deliberate retaliation by state actors against an individual's exercise of this right is actionable under § 1983. *Franco* v. *Kelly,* 854 F.2d 584, 589 (2d Cir. 1988) (intentional obstruction of the right to seek redress "is precisely the sort of oppression that ... section 1983 [is] intended to remedy") (quoting *Morello* v. *James,* 810 F.2d 344, 347 (2d Cir. 1987) (brackets in original)); *Harrison,* 780 F.2d at 1428. And, an action taken by

a prison official against an inmate in retaliation for the use of the prison's grievance process violates that inmate's First Amendment rights. *Thomas* v. *Carpenter,* 881 F.2d 828, 829 (9th Cir. 1989), *cert. denied,* 494 U.S. 1028 (1990); *Soranno's Gasco, Inc.* v. *Morgan,* 874 F.2d 1310, 1314 (9th Cir. 1989); *Rizzo* v. *Dawson,* 778 F.2d 527, 531-32 (9th Cir. 1985). Thus, Webb's first claim for relief alleging that he was prosecuted in retaliation for his refusal to waive his right to sue these defendants for violating his rights states a claim under § 1983.

This claim is not specifically addressed by Defendants in their motion. In fact, they do not acknowledge such a claim has been made. Webb however, sets out facts to support the claim in the "Points of Interest" portion of his opposition. He provides the date his attorney conveyed the offer made by Deputy District Attorney Anne Langer and the specific conditions attached to the offer. As discussed more thoroughly below at footnote 3, Langer enjoys prosecutorial immunity and is not a named defendant in this action, however, under certain circumstances her actions may be sufficient to hold Carson City liable. Because no motion is made in regards to this claim, it survives.[2]

Unlawful Seizure

Webb's second claim for relief is that Defendants violated his Fourth and Fourteenth Amendment rights when they conducted an objectively unreasonable detention, search,

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[2] Even absent a cross-motion, the Court may. upon notice to the opponent, grant summary judgment for either party *site sponte. Celotex Corp.* v. *Catrett,* 477 U.S.17, 317, 326 (1986). The fact that the defendants do not address this claim in their motion for summary judgment and Webb's facts are "uncontroverted" by any evidence presented by the defendants raises the question of whether summary judgment on this claim in Webb's favor would be appropriate. The Court declines to make such a ruling at this point.

and investigation of his guilt. The deputies are also accused of providing false, misleading, or incomplete information to the prosecutor and making false, misleading, or incomplete statements in official proceedings and in court.

Defendants assert that they were legally authorized to arrest Webb, citing Nevada Revised Statute (NRS) 171.124 and Carson City Municipal Code (CCMC) 8.04.050. The statute cited by Defendants provides that it is proper for an officer to make a warrantless arrest when the arrested person commits a felony or a gross misdemeanor in the officer's presence; when the person arrested has committed a felony or gross misdemeanor, although not in the presence of the officer; and, when the officer knows a felony or gross misdemeanor has been committed and the officer reasonably believes the person arrested committed the offense. Finally, the statute permits a warrantless arrest at night if the officer has reasonable cause to believe the person arrested has committed a felony or gross misdemeanor, even if it is later shown that no felony or gross misdemeanor was committed.

Defendants also argue that Webb is unable to state a prima facie case for false arrest or imprisonment, noting that in order to proceed on a § 1983 action for this violation, the plaintiff must meet the state law elements of the tort. In Nevada, false arrest and false imprisonment are integrally related and require a showing "that the person [was] restrained of his liberty under the probable imminence of force without any legal cause or justification." *Marschall* v. *City of Carson,* 464 P.2d 494, 497 (1970). They argue that Webb cannot show he was arrested without legal justification because Webb matched the description of the individual being pursued in the vehicle and foot chase (except for his clothing) and that he was found running and hiding in the area where the driver was last seen.

According to the answers to interrogatories provided by defendant Sloan, Webb was not wearing the same clothes as the suspect, but since he was carrying a bag, it was possible he changed clothes. They declare that under these circumstances, it was reasonable for the deputies to arrest Webb.

Webb contests these alleged facts. He asserts that he was not running from the officers, in fact he did not run at all. He alleges he was walking in the area waiting for a money wire to arrive so he could get a room for the night when a resident in the area flagged down a police car, pointing in Webb's direction and shouting, "There's a black man!" Webb further asserts that even when the officer emerged from her vehicle and looked directly at him, she did not direct him to stop. Webb contends that even though the officer appeared to have no interest in stopping him, he was uncomfortable and continued to leave the area at a "fast walk" because "when [a] White Woman is yelling 'there's a Black Man' you don't stick around even if you've done nothing wrong."[3] According to Webb's sworn statement and testimony at the criminal trial (provided by Defendants with their reply) once Webb rounded the corner of the building he observed six to eight officers with their guns drawn and laser lights on. Concluding that the situation was serious, even dangerous, Webb "ducked down behind the car." Testimony of Webb at trial, at 76-77. Furthermore, Webb testified at trial and in his sworn opposition that as soon as he was contacted by Deputy Guimont and directed to come out from behind the

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[3] Defendants characterize this observation as "conclusory and somewhat fanciful." Reply (Doc. 33) at -1. It is fairly safe to assume that counsel is not a black man. It seems unlikely, however, that he is completely unaware of sociological studies and countless news stories which indicate that men of color. particularly black men. are stopped and questioned by police. without good reason in a disproportionate number. Certainly, Webb's concern was not completely "fanciful."

vehicle he complied fully. Thereafter, he was handcuffed and placed under arrest. Webb states he asked the deputies several times why he was being arrested. The response was "shut up." He also contends that after he was handcuffed, but before he was placed in a police vehicle, Sgt. Moltz, the officer who had originally encountered Webb on the street, informed Deputy Guimont, "that isn't him." The arrest was completed in spite of this and Webb was transported to the jail and booked on only misdemeanor counts.

It should be noted that upon his arrest, no clothes were found in Webb's backpack. In fact, the contents of the pack, approximately thirty pounds of law books, also seem to militate against the reasonableness of Webb's arrest. According to the defendants, during the course of the foot chase through the neighborhood, at least three fences were jumped by the suspect and Deputy Sloan, who was in pursuit of the suspect. Logically, it would be extremely difficult for anyone to run and jump fences carrying a thirty pound pack and still evade the officers. Webb also contends that the original police report and dispatch tape did not include any reference to a black bag in the original suspect's possession. However, these reports and recordings are not before the Court to corroborate Webb's statement.

Additionally, according to the trial testimony provided with the reply, Webb was 34 years old at the time and wears glasses. Apparently, the true suspect, Freddie Little, is eighteen or nineteen and does not wear glasses. Thus, Webb matched the description of the suspect only because he was a black male. It is also of note that Defendants offer shifting theories as to why Webb was attempting to avoid the officers when he was arrested. In the motion, Defendants argue that Webb stated he was afraid that the officers were after him because of a temporary protective order placed against him by his girlfriend. In the defendants' reply they interpret his trial testimony to indicate he was avoiding the officers because he had just urinated on the side of a building. A review of that testimony

leaves the Court believing that Webb was concerned, *at the time trial*, that if he admitted to public urination he might "get in trouble."

Mere suspicion which arises from the defendant's presence in the vicinity of the crime does not constitute probable cause. *Block* v. *State,* 604 P.2d 338, 340 (Nev. 1979). Nor does flight in response to approaching police officers, in and of itself, constitute probable cause. *Id.* Taking the evidence and the allegations in a light most favorable to Webb, it is difficult to find the arrest lawful. A citizen's mere presence in the general vicinity of a suspect should not give rise to an obstructing charge. Webb swears that at no time did he refuse to obey an order given by the officers. He swears he was ducking behind the vehicle to avoid being caught in gun fire. He swears that he informed the officers he was not driving any vehicle at any time that day. Deputy Sloan's contention that Webb's presence distracted the deputies from the true suspect, thereby obstructing the performance of their lawful duties is preposterous; a conclusion supported by Webb's acquittal on that charge. Webb took no affirmative actions to obstruct the officers. He matched the description of the suspect only because he was the same race and gender. At least one officer believed Webb was not the true suspect and informed the defendants of that belief. And, apparently no officer was willing to commit to a reason for arresting Webb when he inquired. In all, because "[m]ere suspicion, common rumor, or even strong reason to suspect are not enough" to establish probable cause to arrest, *Henry* v. *United States,* 361 U.S. 98, 101 (1959), material questions exist as to whether this arrest was legally justified and reasonable.

Initiation and Pursuit of Prosecution Without Probable Cause

Webb contends that the defendants caused criminal charges to be lodged against him and that they assisted in the prosecution of those charges in the absence of probable cause.

He contends that throughout the entire episode, Defendants were aware that there was no legal basis for his arrest and detention, yet Deputies Sloan and Guimont arrested him on various misdemeanor charges and assisted in the prosecution of those charges. Defendants Banister and Carson City are alleged to be responsible as policy makers who permitted a prosecution for an improper "retaliatory" purpose. This is essentially a claim of malicious prosecution.

In order to maintain a § 1983 claim for malicious prosecution, a plaintiff must demonstrate the elements of the tort under state law, as well as a resulting deprivation of constitutionally protected rights. *See Usher* v. *City of Los Angeles,* 828 F.2d 556, 561-562 (9th Cir. 1987); *Torres* v. *Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990). *See also Gowin* v. *Altmiller,* 663 F.2d 820, 823 (9th Cir. 1981). In Nevada, the *prima facie* elements of the tort of malicious prosecution are (1) a lack of probable cause, (2) malice, (3) favorable termination of the prior actions, and (4) damages. *Dutt* v. *Kremp,* 894 P.2d 354, 357 (1995). The defendants assert that the existence of probable cause is a question of law for the court to decide. The cases upon which they rely, however, consider the existence of probable cause in the context of a court's direct review of a criminal arrest. Conversely, the Ninth Circuit has determined that in civil cases, the existence of probable cause is a question for the jury. *McKenzie* v. *Lamb,* 738 F.2d 1005, I 1008 (9th Cir. 1984). They said:

> Our task in determining whether probable cause to arrest existed as a matter of law in [a] § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. By contrast, in [a] § 1983 action the factual matters underlying the judgment of reasonableness

> generally mean that probable cause is a question for the jury, and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.

Id., (citations omitted). The Seventh Circuit agrees, noting that while § 1983 claims presenting the question of probable cause are generally inappropriate for disposition on summary judgment, this is true only where there is room for a difference of opinion. *Llaguno* v. *Mingey,* 763 F.2d 1560, 1565 (7th Cir. 1985). Thus, only if there is no question of the underlying facts and a reasonable jury would have no difficulty determining the existence of probable cause should we grant summary judgment in favor of the defendants on this claim. With that in mind, we review the facts in evidence.

Whether a police officer had probable cause to arrest is ascertained by looking at the facts known to the officer at the time of the arrest and determining whether a reasonably prudent police officer could have believed that the suspect had committed or was committing an arrestable offense. *Beck* v. *Ohio*, 379 U.S. 89, 91(1964). Probable cause exists when, "under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability" that a crime was committed. *United States* v. *Smith,* 790 F.2d 789, 792 (9th Cir. 1986). "Conclusive evidence of guilt is not necessary to establish probable cause. Mere suspicion, common rumor, or even strong reason to suspect are not enough. however." *McKenzie,* 738 F.2d at 1008 (citing *Henry* v. *United States,* 361 U.S. at 101).

As the discussion addressing the claim of unlawful seizure demonstrates, the circumstances surrounding Webb's arrest are in question. The defendants say Webb had reason to avoid them (either because he had a restraining order against him or because he had just urinated on a building), he fit the description of the suspect except for his clothes, and he was

hiding under a car, giving the deputies cause to arrest him. Defendants also contend that the independent determinations of probable cause made by the magistrate and the prosecuting attorney support denial of this claim. Conversely, Webb attests that when he was first confronted by Sgt. Moltz, she did not request that he stop or attempt to detain him in anyway. He testifies that he did not run from the police, but was hoping to stay out of the way of gun fire. Webb immediately complied with any orders or directives the deputies issued. Webb also points out that he only generally fit the suspect's description and that he was carrying a thirty-pound backpack, making it virtually impossible for him to have jumped three fences to elude the officers, especially without breaking a sweat. Finally, he notes that at least one officer believed that he was not the proper suspect and she informed the defendants of this belief. Webb also states in his opposition that the only reason the magistrate held him was because Webb had appeared in his courtroom less than one month before on a domestic matter. He also asserts that the magistrate "placed no legal judgment of Probable Cause within the Police Report," relying instead on Webb's previous court appearance as reason to hold him.

Defendants' argument regarding the independent judgment of the prosecutor is called into question based on the malicious prosecution and retaliation claims which arise almost solely due to the actions of the prosecutor. Thus, a proper finding of probable cause by the magistrate or the prosecutor is also in doubt. Because of the opposing evidence submitted, this is a question for the jury and summary judgment would be improper.

Qualified Immunity

Defendants next contend that they are entitled to qualified immunity because there was probable cause to arrest Webb. Alternatively, they submit that even if probable cause was not present, they should be entitled to immunity because "a

reasonable official, confronted with the specific facts at issue and the law in effect at the time," would have considered their actions to be proper, citing *Schertz* v. *Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). Government officials performing discretionary functions are entitled to qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed. *Anderson* v. *Creighton*, 483 U.S. 635 (19S7); see *Wood* v. *Sunn*, 852 F.2d 1205 1209 (9th Cir. 1988). This is a fact-specific, objective test. *Anderson*, 483 U.S. at 641; *see Harlow*, 457 U.S. at 819. Because qualified immunity entitles government officials to "an immunity from suit rather than a mere defense to liability," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), it is essential that "insubstantial claims" be resolved as quickly as possible. *Anderson*, 483 U.S. at 639 n. 2; *Harlow*, 457 U.S. at 817-18. When available, entitlement to qualified immunity may be established as a matter of law by the district court on a motion to dismiss, for summary judgment, or for a directed verdict *Thorsted* v. *Kelly*, 858 F.2d 571, 575 (9th Cir. 1988).

Thus, the question to be answered by us is: Would a reasonable officer in the defendants' place, with the information they had, believe that probable cause to arrest Webb was manifest? This determination may be made on summary judgment if there are no genuinely disputed material factual issues resolution of which is necessary to determine qualified immunity. *Act Up!/Portland* v. *Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). However, if a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial. *Id.* Accordingly, the court noted that two categories of factual issues exist which may preclude a determination of qualified immunity on summary judgment. First, in order to determine the existence of probable cause,

inquiry must be made into the facts and circumstances known to the officers at the time. *See. e.g, United States* v. *Greene*, 783 F.2d 1364, 1367 (9th Cir.), cert. denied, 476 U.S. 1185 (1986). If disputes regarding the facts material to this determination are present and genuine, it is for the fact finder. *ActUp!/Portland,* 988 F.2d at 873. Second, the court said:

> the determination of what conduct underlies the alleged violation--what the officer and claimant did or failed to do--is a determination of fact. We hold, however, that the determination of whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court. It is not in itself a factual issue that can preclude summary judgment .... Of course, if the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful, he is not entitles to qualified immunity.

Id. (footnote omitted).

In this instance, only sparse facts are presented about what the defendants knew when they decided to arrest Webb. No evidence is presented regarding Guimont's knowledge on that night. We do know what Webb believes the deputy knew-that Webb "isn't the one." Neither do we have before us any reports filed by the deputies in support of the arrest. Webb's sworn statement raises a number of questions that are material to a determination of the reasonableness of the deputies' actions under the circumstances. Such evidence would necessarily need to be presented in order to male an accurate determination. The absence of these facts is sufficient to preclude us from granting qualified immunity, however, we shall also address the second test.

As noted, we may also consider what the parties did during the course of events leading to Webb's arrest. Much

remains at issue on this point, as revealed in the previous discussion of probable cause. In reviewing what the deputies relied on to find probable cause, it seems significant that defendant Sloan states in his interrogatory responses:

> Subject David Webb was obstructing or delaying a peace officer by running/hiding from officers according to citizens reporting his activity. Subject David Webb stated he was running from me/officers. Subject David Webb *drew our attention away from the initial incident* . . . . David obstructed me [and] the other officers in the areas *by bringing our attention [to] him and not the suspect (driver) of the foot chase.*

Motion to Dismiss/Summary Judgment at 3, as summarized from Exhibit A. The contention that a citizen was obstructing an officer in his duties because his presence drew the officers' attention away from the real suspect is a misapplication of the ordinance under which Webb was arrested. That ordinance states:

> It is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay, or molest any city officer or member of the sheriffs office or fire department of Carson City in the discharge of his official duties.

CCMC 8.04.050. Certainly this ordinance is designed to address affirmative or purposeful actions taken by individuals which would result in an obstruction of duty. Mere presence, even being crouched behind a car, cannot be said to be an affirmative act designed to hinder or delay an officer. Additionally, it is not clear from the evidence presented that the man whom citizens were making reports about was actually Webb. Since the officers did not know where their suspect was, it is entirely possible the reports were about the suspect, Freddie Little, and not about Webb. In any event, sufficient questions

remain and material facts are disputed by the parties to an extent that precludes granting Defendants qualified immunity.

Municipal Liability

In his fourth claim for relief and throughout the body of the complaint, Webb alleges that persons in policymaking positions, particularly Sheriff Banister and Chief Criminal Deputy District Attorney Anne Langer, contributed to the constitutional violations against him. Webb alleges the sheriff had a custom, practice, or policy of failing to train his deputies sufficiently to prevent them from wrongfully arresting and detaining citizens without probable cause, filing false or misleading police reports, giving false statements and testimony in court, or allowing innocent persons to remain in jail and thereafter participating in the wrongful prosecution of those they know to be innocent of the charged offenses. Carson City is alleged to have approved or ratified this policy and practice.

Banister is named as a defendant in his official capacity. Official capacity actions generally represent another way "of suing an entity of which an officer is an agent." *Kentucky* v. *Graham,* 473 U. S. 159,165 (1984), *quoting Monell* v. *New York City Dept of Social Services,* 436 U.S. 658, 690 n. 55, (1978). Thus, Banister is being sued as a agent of Carson City. A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents under a theory of *respondeat superior.* Only when the action that results in the injury is taken pursuant to the government's policy or custom, whether resulting from legislative action or the words and deeds of persons who "may fairly be said to represent official policy," is the government as an entity responsible under § 1983. *Monell* v. *Department of Social Services of City of New York,* 436 U.S. 658, 694 (1978). Indeed, "local governments, like every other § 1983 'person,' may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such

custom has not received formal approval through the government's official decision-making channels." *Id.* at 669.

Webb's claim against Sheriff Banister and Carson City is based on an alleged failure to train the deputies which exhibits a deliberate indifference to the safety and security of citizens. Under the rule of *City of Canton, Ohio* v. *Harris,* 489 U.S. 378 (1989), "the inadequacy of police training may serve as the basis for a § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The question is not whether the Sheriff and the City are responsible for the deputies training, but rather, whether that training is adequate; and if inadequate training is found, does it represent city policy. *Id.* This question of deliberate indifference turns on whether, in light of the duties performed by the deputies, the need for more training is obvious and the lack of training is likely to result in the deprivation of citizens' constitutional rights. *Id.*

Defendants argue that this claim fails because no constitutional violation has occurred against Webb, and thus the deputies' training cannot be said to be deficient. As the discussion above reveals, material questions remain which foreclose the Court from drawing such a conclusion. Defendants also contend that Webb has offered no evidence to support this allegation and that the deputies attendance at the Police Officers Standard Training (POST) program rebuts the contention.

In his opposition, Webb does not directly address a policy or custom. He sets out the time line of events that seems to show the officers knew or should have known at the time of his arrest that they did not have sufficient probable cause to arrest. He further notes, that over the course of the next several days, they received more information that pointed to another suspect. Webb suggests the deputies should have behaved differently, however, he does not tie these events to others which might also evidence an "obvious" lack of training on the

part of Carson City deputies. His complaint makes a bald assertion which he does not support further with facts. Therefore, summary judgment on the failure to train claim is appropriate, and Sheriff Barrister should be dismissed from the action.

Carson City is also alleged to have approved or ratified the decision of policymaker Anne Langer to prosecute persons that she knows "or reasonably should have known" are innocent. The City is alleged to have ratified Lancer's practice of punishing, by means of unjustified or malicious prosecution, innocent persons who refuse to waive their constitutional rights to seek redress for wrongs inflicted by the government. Webb claims the City should be liable for the actions taken by policymaker Ann Langer, Chief Criminal Deputy District Attorney.[4] Webb alleges it was Langer's decision to pursue the obstruction charge, even in the face of evidence showing he was improperly arrested and charged as the suspect in the vehicle chase. Specifically, Ms. Langer was the official who pursued the prosecution after Webb refused her "deal." Ms. Langer is alleged to have improperly attempted to get Webb to waive his constitutional rights in exchange for dismissing the charges.

Initially we must determine whether Ms. Langer, as Chief Criminal Deputy District Attorney, is indeed a policymaker so as to bind Carson City by her actions. Whether an official has policy making authority is a matter of state law. *Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 481(1986)

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[4] Ms. Lamer enjoys absolute immunity as a prosecutor and presumably was not named a defendant in this action for that reason. *See Imbler* v. *Pachtman,* 424 U.S. 409, 427 (1976) ("We conclude that [prosecutors enjoy] the same absolute immunity under § 1983 that the prosecutor enjoys at common law"); *Ashelman v. Pope,* 793 F.2d 1072.1078 (9th Cir. 1986) (prosecutors are absolutely immune for quasi judicial activities taken within scope of their authority).

("Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law"). In Nevada, Chapter 252 of the Nevada Revised Statutes sets out the duties and authority of district attorneys. Specifically, subsection 070 states:

> 1. All district attorneys are authorized to appoint deputies, who may transact all official business appertaining to the offices, to the same extent as their principals.

NRS 252.070. Furthermore, it has been held that matters of prosecution are within the entire control of the district attorney. *Cairns* v. *Sheriff, Clark County,* 89 Nev. 113. 508 P.2d 1015 (1973); *Lane* v. *Second Judicial Dist., Washoe County,* 104 Nev. 427, 760 P.2d 1245 (1988). Therefore, since final authority on questions of prosecution lie with the district attorney, and deputy district attorneys have authority "to the same extent as their principals," Ms Langer has policy making authority as delegated to her by state law.

Second, we must determine if this particular decision can be construed to represent a policy, practice, or custom of the City. The Supreme Court has held that municipal liability may be imposed under § 1983 for a single decision made by policymakers under appropriate circumstances. *See Pembaur,* 475 U.S. at 480. The Court said:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by the government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More

> importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Id. at 481. The Court took pains to note that municipal liability would not attach in all instances, but "only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* Langer, as prosecutor, has final authority in questions of prosecution. Her decision to condition Webb's prosecution on his willingness to waive a constitutional right represents policy and sets Carson City up as liable.

Finally, we must determine if Langer's decision resulted in a violation of Webb's constitutional rights. The Ninth Circuit has recognized in several different contexts that a state may not use its control over discretionary government benefits in a manner that places excessive burdens on certain constitutional rights. In *Vignolo* v. *Miller,* the court noted that under the doctrine of "unconstitutional conditions," even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *Vignolo Vignolo* v. *Miller,* 120 F.3d 1075, 1077 (9th Cir.1997).

> The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not

> command directly." Such interference with constitutional rights is impermissible.

Id.,citing *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972) (internal citation omitted). See also, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (Dolan); *Nollan* v. *California Coastal Commission,* 483 U.S. 825 (1987); *Hyland* v. *Wonder,* 972 F.2d 1129 (9th Cir.1992), *cert. denied,* 508 U.S. 908 (1993); *Parks* v. *Watson,* 716 F.2d 646, 652-53 (9th Cir. 1983). In this instance, Langer offered to exercise her discretion in prosecuting Webb in exchange for a waiver of his First Amendment right to seek redress for wrongs inflicted by the government. Placing such unconstitutional conditions on Webb's freedom are clearly not permitted. Furthermore, Defendants have again failed to acknowledge that this claim has been made. As a result, summary judgment should not issue in their favor.[5]

Federal Conspiracy and Pendent State Law Claims

Webb raises a federal conspiracy claim against all defendants. He contends that the actions taken by the various defendants easily show an agreement among them, as well as actions taken by them, to interfere with his constitutional rights. This is a violation of 42 U.S.C. § 1985. Webb also raises a due process claim under the federal and state constitutions (Ninth Claim for Relief) which is not addressed by Defendants except as a pendent claim. Defendants mistakenly inform the Court that these and the remaining claims are state law causes of action. Additionally, Defendants mistakenly inform the Court

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[5] Here again arises the question of whether Webb should be granted sun summary judgment against defendants in view of the Court's power to *sua sponte* grant such relief. *See* note one, supra. At this time the Court shall not issue summary judgment for either party.

that Webb did not invoke the Court's pendent jurisdiction over the remaining claims. A quick review of the complaint exposes this error in Defendants' representation. Obviously, a federal conspiracy claim is not a state law tort; neither is a due. process claim raised under the Fourteenth Amendment to the United States Constitution. However, false arrest, abuse of process, malicious prosecution, and intentional infliction of emotional distress are state law torts. Because no argument was made in reference to the federal conspiracy or due process claims, they survives Defendants' motion.

Defendants argue that the state claims are barred by NRS 41.032(2) which provides that "no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is: . . . (2) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." NRS 41.0307 defines the following terms used in "NRS 41.031 to 41.039, inclusive:"

1. "Employee" includes an employee of -a part-time or full-time board, commission or similar body of the state or a political subdivision of the state which is created by law.

***

4. "Public Officer" or "officer" includes:

(a) A member of a part-time or full-time board, commission or similar body of the state or a political subdivision of the state which is created by law.

(b) A public defender and any deputy or assistant attorney of a public defender.

This definition militates against the application of this statute to actions taken by police officers. Further, a review of the statute's legislative history indicates quite clearly that it was not the intent of the Nevada Legislature to provide discretionary immunity to the deputies. The statute to limit the state's waiver of Eleventh Amendment immunity was originally enacted in 1965. At the very next legislative session in 1967, it was amended to specifically remove from the statute's coverage claims against peace officers for false arrest. *See, Limitations on Actions Against the State, Political Subdivisions: Hearings on AB 274 Before the Committee on Judiciary,* 54th Session (1967) (statement of Assemblyman Torvinen)("This repeals the section [NRS 41.034] which says that no suit may be brought against any municipality or agency resulting from action of peace officer except for gross negligence.' It is primarily striking the section saying you cannot sue for false arrest. It is restoring that right. I would like to pass the bill out. It has merit"). According to the Committee Minutes of March 24, 1967, the motion passed unanimously. *Id.* The amendment to the statute passed the Nevada State Senate on April 7, 1967, and thereafter became law. *Statutes of Nevada,* 1967 at 993. It is also of particular note that all further legislative action taken in relation to the limitation of actions against the state addressed in this statute were specifically directed to acts by agencies, commissions, and other policy-making or regulatory boards. In 1983, amendments were made to address actions arising from citizens' right in real property. *Statutes of Nevada,* 1983 at 2100. Specifically, the amendment was designed to address actions taken by county planning commissions and the Tahoe Regional Planning Agency. In 1987, "immune contractors" language was added to provide indemnity for doctors and other medical professionals who contract to provide care at the state prisons. *Statutes of Nevada,* 1987. This was the result of a tort reform movement within the State Legislature.

Furthermore, because the discretionary function exception to the state's waiver of sovereign immunity is nearly

identical to that in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), federal precedents are relevant to our interpretation. *Scott* v. *Department of Commerce,* 763 P.2d 341 (Nev. 1988). In analyzing the applicability of the discretionary function exception under the Federal Tort Claims Act, a two-part test is applied. *See, Miller* v. *US.,* 163 F.3d 591 (9th Cir. 1998). First, the exception covers only acts that are discretionary in nature; those necessarily involving an element of choice. *Blackburn* v. *United States,* 100 F.3d 1426,1429 (9th Cir.1996). The choice requirement is not satisfied where a statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the person has no rightful option but to adhere to the directive. *Berkovitz by Berkovitz* v. *U.S.*, 486 U.S. 531, 536 (1988). Second, once it is determined that discretion is involved, there must also be a finding that the discretion requires the type of judgment that the exception is designed to shield. *Id.* The exception protects only government actions and decisions based on, "social, economic, and political policy." *Id.* While, the decision need not be actually based on overt policy considerations, it must be susceptible to a policy analysis. *U.S.* v. *Gaubert,* 499 U.S. 315, 325 (1991); *Federal Deposit Ins.* Corp. v. *Craft,* 157 F.3d 697, 707 (9th Cir. 1998).

Defendants argue that the decision whether to arrest and prosecute Webb was discretionary. Applying the test used in *Miller, supra.,* this argument fails. The deputies' decision to arrest does not require consideration of basic social, economic, or political policy. The propriety of an arrest is closely guided by requirements set out in the United States Constitution, the Nevada State Constitution, the Nevada Revised Statutes, and almost assuredly by internal policies of the Carson City Sheriffs Office. These guides leave little room for officer discretion. Because of the clear legislative intent of set forth above when the Nevada Legislature enacted and amended NRS 41.032 as well as the consideration of the *Miller* factors, we conclude that the defendant deputies do not enjoy sovereign immunity. *Cf. Ortega* v. *Reyna,* 114 Nev. 55, 953 P.2d 18 (1998); *Maturi* v.

Las Vegas Metropolitan Police Dep't, 110 Nev. 307, 871 P.2d 932 (1994). The state law torts of false arrest, abuse of process, malicious prosecution, and intentional infliction of emotional distress shall not be dismissed.

CONCLUSION

Despite the form and nature of Webb's opposition to the defendants' motion to dismiss or alternatively motion for summary judgment, he raises sufficient questions of material fact to preclude summary judgment on all the federal claims except the allegation of failure to train against Sheriff Banister and Carson City. Further, the defendant deputies should not benefit from qualified immunity. Viewing the facts in a light most favorable to Webb, the basis for arresting and charging Webb is so tenuous that it precludes a any judicial determination that the officers could have reasonably thought their actions were legal and did not violate Webb's clearly establish rights.

Webb has not addressed the failure to train claim in his opposition to the motion for summary judgment. The allegations contained in the complaint are too conclusory and without any factual support to stand alone. Under the *Canton* v. *Harris* standard, "the need for more or different training must be so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." *Id.*, 489 U.S. at 390.

In as much as Deputy District Attorney Langer is in a position to make and enforce policy within the criminal division of the prosecutor's office, her decision to offer an improper, even illegal deal to Webb can be said to represent the policy of Carson City, making the City answerable for the malicious and retaliatory prosecution charges. Moreover, since Defendants have not addressed the federal claims of retaliatory prosecution

and federal conspiracy relating to Langer's actions, summary judgment in their favor is not appropriate. Where no motion is made or evidence presented, this Court will not grant summary judgment.

Despite Defendants' counsel's apparent confusion about the invocation of pendent jurisdiction, the state law claims are rightfully before this Court. Argument that sovereign immunity forecloses this Courts' jurisdiction to hear them is not persuasive. The State's waiver of immunity as set forth in NRS 41.032(2) protects only discretionary acts that are based on social, economic or political policy considerations. The arrest of Webb, while requiring some judgment on the part of the deputies, is guided so closely by constitutional requirements, state statute, and presumably, internal policy as to make the action operational and not discretionary. These claims shall survive the motion as well.

IT IS THEREFORE **ORDERED** that Defendants' Motion to Dismiss or Alternatively for Summary Judgment (Doc. # 18) is GRANTED as to Webb's Fourth Cause of Action against Defendants Banister and Carson City for failure to train.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or Alternatively for Summary Judgment (Doc. # 18) is DENIED as to all remaining causes of action.

IT IS FINALLY ORDERED that Defendant Banister is DISMISSED from the action.

Dated this 20 day of August, 1999.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

[jurats omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

DAVID Q. WEBB	) CV-N-97-673-ECR
vs.	) MINUTES OF THE COURT
DARRIN SLOAN, ROBERT GUIMONT, ROD BANISTER, and CARSON CITY.	) March 21, 2001

PRESENT: EDWARD C. REED, JR. - U.S. District Judge
Deputy Clerk: BRENDA L. GORBET
Reporter: NONE APPEARING
Counsel for Plaintiff: NONE APPEARING
Counsel for Defendant: NONE APPEARING

MINUTE ORDER IN CHAMBERS

This case arises out of the arrest of an adult male. The plaintiff has moved for partial summary judgment (#58). Defendants have opposed (#60) the motion. Plaintiff replied (#63). This motion is ripe for decision.

Background

We have set out the surrounding facts of this case in detail in our previous order dated August 20, 1999. Therefore, we have included only a general background of the case.

On June 27, 1997, Defendant Sloan observed a vehicle speeding in Carson City. Officer Sloan chased the vehicle into a parking lot where the driver of the vehicle ran away from the vehicle and jumped over a fence. Officer Sloan attempted to chase the individual but lost sight of him in a trailer park behind the Carson City Inn. He called for assistance and police officers set up a perimeter around the area. Officer Sloan did not get a clear view of the individual but did notice that he was a black adult male wearing dark pants and no shirt. Officer Sloan also states that the suspect carried a backpack. At this point, the officer returned to inspect the vehicle and then heard over the radio traffic that a black male was spotted running into Evergreen Center.

Earlier that same day, David Webb ("Webb") was served with a temporary protective order ("TPO") to vacate his shared room at the Carson City Inn. Webb alleges that he called his sister in Boston to borrow some money and to wire it to the Frontier Motel Convenience store. Webb vacated his room and went for a walk while he waited for the money. Webb wore a white shirt, dark pants, and carried a backpack. Webb states that during his walk he heard someone yell and he ducked behind a parked car. Deputy Guimont found Webb and asked him to stand up. Webb was questioned and then arrested once Officer Sloan arrived and identified him as the man he was chasing.

On July 3, 1997, an informant called the Sheriff's Department and said that Freddy Little was bragging about having escaped the cops. This information made Officer Sloan doubt whether plaintiff was the individual he had chased. Officer Sloan contacted the Deputy District Attorney Melanie Bruketta and appraised her of the new information. Webb was released from jail. The charges against plaintiff were eventually dropped. Plaintiff has filed a complaint alleging violation of his First Amendment right, false arrest, false imprisonment, malicious prosecution, failure to train, and conspiracy.

I. Analysis

A. Section 1983-False Arrest

Under section 1983 "[e]very person who, under color of [state law], . . . [deprives] any citizen of the United States . . of any rights, privileges; or immunities secured by the Constitution and laws, shall be liable to the party injured. . ." 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution prohibits arrest without probable cause. Arrests without probable cause thus give rise to a cause of action for damages. *McKenzie* v. *Lamb*, 738 P.2d 1005, 1006 (9th Cir. 1984). "In a [section] 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest." *Id.* at 1008.

In determining whether the officers did or did not have probable cause the court must look at "some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense." *Id.* (citing *Beck* v. *Ohio*, 379 U.S. 89, 90-91 (1964)). "Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in' themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Dunaway* v. *New York*, 442 U.S. 200, 208 n.9 (1979). Viewing all the facts in the light most favorable to the defendants, we find that genuine issues of material fact exist for trial.

Plaintiff alleges that the officers knew the following before they arrested him: that they were looking for a black male, aged eighteen to nineteen, that the individual was shirtless but wore dark pants and was carrying a backpack, that this male

was the driver and sole occupant of the vehicle, and that the suspect's name was Freddy Little. The plaintiff claims that although he was carrying a backpack it was very heavy so he could not have been on the run, he was 34 years old at the time of his arrest and could not have been confused for a teenager, and the officer's knew his name was not Freddy Little because he had a TRO in his backpack that identified him as Daniel Webb.

However, a review of the evidence shows that these facts are in dispute. Deputy Sloan's testimony reveals that he knew the following about the suspect he was chasing: the suspect was a black male adult who did not have a shirt on, wore dark pants and carried a black backpack. (Plaintiff's Motion, Ex. 1, p. 8) The suspect jumped a fence into a trailer park right behind the Carson City Inn. It is not clear that the officers knew who the suspect was or the age of the suspect. Deputy Sloan testified that he did not get a very clear view of the suspect because the suspect was running away from him. The plaintiff was stopped and arrested because he wore dark pants, had a backpack, and was in the vicinity of the Carson City Inn. Furthermore, plaintiff hid from the police officers under a vehicle. We find that under this set of facts and circumstances a reasonable jury could find that the officers had probable cause to arrest plaintiff. Therefore, we deny the plaintiff's motion for summary judgment on his federal and state false arrest claim.

B. False Imprisonment

"'To establish false imprisonment of which false arrest is an integral part, it is . . necessary to prove that the [plaintiff was] restrained of his liberty under the probable imminence of force without any legal cause or justification.'" *Hernandez* v. *City of Reno*, 97 Nev. 429, 433, 634 P.2d 668 (1981) (quoting *Marschall* v. *City of Carson*, 86 Nev. 107, 110, 464 P.2d 494 (1970)). The plaintiff bears the burden of proving that the delay following his arrest was unlawful. "'A few hours may

constitute an unnecessary delay; whether the defendant proceeded with due diligence depends on the circumstances of the particular case.'" *Yada* v. *Simpson*, 112 Nev. 254, 255 (1996) (quoting *Nelson* v. *City of Las Vegas*, 99 Nev. 548, 554 (1983)). The plaintiff alleges that he was unreasonably detained in jail for a prolonged period of time after the officers and district attorney knew that he was not the suspect Officer Sloan had chased. The defendants' have produced evidence contradicting the plaintiff and showing that the Carson City District Attorney's office acted swiftly in bringing plaintiff before a magistrate and also in releasing plaintiff once Officer Sloan was no longer sure that plaintiff was the suspect he had chased. (Defendants' Opposition, Ex. A, Affidavit of Melanie Bruketta). Therefore, we find that a genuine issue of material fact exists as to whether plaintiff was falsely imprisoned.

C. Malicious Prosecution

The following elements must be proved in a malicious prosecution action: (1) a lack of probable cause to commence the prior action; (2) malice; (3) favorable termination of the prior action; and (4) damages. *Dutt* v. *Kremp*, 111 Nev. 567, 571 (1995). When there is no dispute concerning the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute the prior action is purely a legal question to be answered by the court. *Bonamy* v. *Zenoff*, 77 Nev. 250, 252 (1961). We find that in this case the facts are in dispute and that a jury should be given the opportunity to find the facts, after which the court will make the legal determination of probable cause to commence the action.

D. First Amendment-Overbroad Statute

The plaintiff also seeks summary judgment on his First Amendment Claim. The plaintiff argues that Carson City Municipal Code 8.04.050 ("CCMC") is unconstitutional because it is vague or overbroad on its face and prohibits more

speech than necessary. Carson City's Municipal Code 8.04.050 provides that:

> [i]t is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any city officer or member of the sheriff's office or fire department of Carson City in the discharge of his official duties.

The plaintiff relies on *City of Houston* v. *Hill*, 482 U.S. 451 (1987) for his argument. In *Hill*, the Court held that the City of Houston's ordinance was unconstitutionally overbroad under the First Amendment. In that case, the City of Houston had enacted the following ordinance:

> It shall-be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

First, the Court held that the "enforceable portion of the ordinance deals not with the core criminal conduct, but with speech. As the city has conceded, the language in the ordinance making it unlawful for any person to 'assault' or 'strike' a. police officer is preempted by the Texas Penal Code . . ." *Id.* at 460. The Court, therefore, found that the enforceable portion of the statute prohibited verbal interruptions of police officers. *Id.* at 461. The Court noted that the First Amendment protects a significant amount of verbal criticism and challenges directed at police officers. *Id.* Plaintiff argues that Carson City's ordinance has the same problems that the city of Houston's ordinance contained in *Hill*. The plaintiff overlooks some key distinctions.

Central to the Court's decision in *Hill* was the fact that state law preempted coverage of physical acts, leaving an ordinance that prohibited verbal interruptions of police officers.

The Court stated that the "enforceable portion of the ordinance deals not with core criminal conduct, but with speech."

Carson City's Municipal Code is different. It applies to one who may "hinder, obstruct, resist, delay [or] molest." We also note that plaintiff makes no empirical showing that the ordinance covers cases involving verbal communications that are protected by the First Amendment. In contrast, in *Hill*, Hill introduced extensive evidence of the unconstitutional application of the ordinance to protected speech. Furthermore, an evaluation that a statute is vague implies that "men of common intelligence must necessarily guess at its meaning . . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385 (1926). "Words inevitably contain germs of uncertainty . . . ." *Broadrick* v. *Oklahoma*, 413 U.S. at 608. However, words are to be given their ordinarily understood meaning. We question whether an individual evaluating this statute to determine the conduct proscribed would conclude that it was directed to or substantially encompassed speech as opposed to conduct.

Only a statute that is substantially overbroad may be invalidated on its face. *New York* v. *Ferber*, 458 U.S. 747, 769 (1982). A statute will not be held invalid simply because it "is possible to conceive of a single impermissible application." *Id.* We do not view Carson City's Municipal Code 8.04.050 as reaching a substantial amount of protected conduct, therefore we do not find it overbroad.

E. Section 1983-custom policy or practice

The plaintiff also moved for summary judgment on his section 1983 claim against Carson City. The plaintiff claims that the City had a custom, policy or practice of falsely imprisoning or maliciously prosecuting citizens. Plaintiff argues that CCMC 8.04.050 is the official policy or custom. We have determined that CCMC 8.04.050 is not unconstitutional.

Therefore, Carson City does not have a custom, policy or practice of depriving individuals of their rights.

F. Section 1983-offer to dismiss in exchange for a release of civil liability.

Plaintiff alleges that the Deputy District Attorney's offer to dismiss the obstruction charge if he signed a waiver relinquishing his right to sue the defendants violated his First Amendment right to petition the government for redress of his grievances. First, an agreement to dismiss criminal charges in exchange for a release of civil liability is enforceable and does not violate public policy, even a section 1983 action. *Newton* v. *Rumery*, 480 U.S. 386 (1987). So on its face, the Deputy District Attorney's offer did not violate any of plaintiff's rights. Second, we note that plaintiff was not prevented from seeking redress against the defendants. Plaintiff has filed this suit. Therefore, plaintiff was not stopped from exercising any of his rights under the First Amendment.

Conclusion

We find that the facts in this case are in dispute and that defendants' have produced sufficient evidence to create a genuine issue of material fact as to plaintiff's claims for false arrest, false imprisonment, and malicious prosecution. We also find that Carson City's Municipal code 8.04.050 is not unconstitutional.

IT IS THEREFORE HEREBY ORDERED THAT plaintiff's motion for summary judgment is **DENIED**.

LANCE S. WILSON, CLERK

By: /s/
Deputy Clerk

APPENDIX E

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Nevada Revised Statutes:

NRS 246.030 Deputies.

1. All county clerks are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office to the same extent as their principals. A deputy must be at least 18 years of age.

2. County clerks are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county clerks.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the

principal legally holds and exercises his office. Revocations of such appointments must be recorded in the same manner. From the time of the recording of the appointments or revocations, persons shall be deemed to have notice of the appointment or revocation.

NRS 247.040 Deputies.

1. All county recorders are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office to the same extent as their principals. A deputy must be at least 18 years of age.

2. County recorders are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county recorders.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the county recorder legally holds office. Revocations of such appointments must be recorded in the same manner. From the time of the recording of the appointments or revocations, persons shall be deemed to have notice of the appointment or revocation.

NRS 248.040 Appointment and removal of deputies.

1. Except as provided in NRS 248.045, each sheriff may:

   (a) Appoint, in writing signed by him, one or more deputies, who may perform all the duties devolving on the sheriff of the county.

(b) Except as otherwise provided in this paragraph, only remove a deputy who has completed a probationary period of 12 months for cause. A deputy who functions as the head of a department or an administrative employee or who has not completed the probationary period may be removed at the sheriff's pleasure.

2. No deputy sheriff is qualified to act as such unless he has taken an oath to discharge the duties of the office faithfully and impartially. The oath must be certified on the back of his appointment and filed in the office of the county auditor.

3. The sheriff may require of his deputies such bonds as to him seem proper.

NRS 250.060 Deputies.

1. All county assessors are authorized to appoint deputies, who are authorized to transact all official business relating to the offices to the same extent as the county assessors. A deputy must be at least 18 years of age.

2. County assessors are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county assessors.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the county assessor legally holds and exercises his office. Revocations of such appointments must also be recorded as provided in this section. From the time of the

recording of the appointments or revocations therein, persons shall be deemed to have notice of the appointments or revocations.

NRS 252.070 Deputies; clerical, investigational and operational staff.

1. All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.

2. District attorneys are responsible on their official bonds for all official malfeasance or nonfeasance of the deputies. Bonds for the faithful performance of their official duties may be required of deputies by district attorneys.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the district attorney legally holds and exercises his office. Revocations of those appointments must also be recorded as provided in this section. From the time of the recording of the appointments or revocations therein, persons shall be deemed to have notice of the appointments or revocations.

4. Deputy district attorneys of counties whose population is less than 100,000 may engage in the private practice of law. In any other county, except as otherwise provided in NRS 7.065 and this subsection, deputy district attorneys shall not engage in the private practice of law. An attorney appointed to prosecute a person for a limited duration with limited jurisdiction may engage in private practice which does not present a conflict with his appointment.

5. Any district attorney may, subject to the approval of the board of county commissioners, appoint such clerical, investigational and operational staff as the execution of duties and the operation of his office may require. The compensation of any person so appointed must be fixed by the board of county commissioners.

6. In a county whose population is 400,000 or more, deputies are governed by the merit personnel system of the county.

NRS 252.080 Public prosecutor.

The district attorney in each county shall be public prosecutor therein.

NRS 252.090 Attendance of courts in county.

The district attorney shall:

1. Attend the district courts held in his county, for the transaction of criminal business.

2. Attend justices' courts in his county, when required by justices of the peace, and conduct all prosecutions on behalf of the people for public offenses.

NRS 252.110 Duties. The district attorney shall:

1. Draw all indictments, when required by the grand jury.

2. Defend all suits brought against his county.

3. Prosecute all recognizances forfeited in the district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to his county.

4. Except with respect to matters for which the board of trustees of the school district has employed private counsel, draw all legal papers, give his written opinion when required on matters relating to the duties of the board of trustees and transact the legal business of the school district whose boundaries are conterminous with the boundaries of his county, and perform such other legal duties as may be required of him by the board of trustees.

5. Bring all actions on behalf of the county for abatement of nuisances pursuant to order of the board of county commissioners or, in the discretion of the district attorney, pursuant to an ordinance of the county as provided by NRS 244.360, subsection 6, including actions for injunction, as well as for recovery of compensatory and exemplary damages and costs of suit.

6. Perform such other duties as may be required of him by law.

(2)

No. 03-464

Supreme Court, U.S.
FILED
OCT 28 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

ROBERT W. STORY
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PARTIES TO THE PROCEEDINGS

Petitioner Carson City has accurately listed the parties before the Ninth Circuit Court of Appeals. However, the law firm of Cooke & Story, Ltd. (the "firm") has an interest in the judgment at issue. The firm represented Respondent David Q. Webb before the district court and the appeals court. The firm has an attorneys' fee lien in the judgment at issue and has been awarded attorneys' fees by both the district court and appeals court. Webb does not have the financial wherewithal, legal training, nor grasp of the issues to represent himself before this Court. Accordingly, the firm files this Brief in Opposition. *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970) (Former attorney entitled to intervene as a matter of right because "[n]either of the existing parties is concerned with protecting the [attorney's] interest."); *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989) (Former attorneys allowed to intervene to protect attorneys' interests.).

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Carson City arrested and incarcerated David Q. Webb ("Webb") on June 27, 1997, on the charges of obstructing a police officer, reckless driving, no valid driver's license, and no proof of insurance. The Carson City District Attorney's office (the "DA's office") dismissed the charges of reckless driving, no valid driver's license, and no proof of insurance on August 22, 1997. After a criminal trial on the merits on October 30, 1997, a Carson City municipal judge found Webb innocent of the charge of obstructing a police officer.

Webb filed a complaint in this case on November 26, 1997, in federal district court in Reno, Nevada. On August 24, 2001, after a four-day civil trial on the merits, the jury entered unanimous verdicts in favor of Webb and against Carson City on two civil rights claims – false imprisonment and malicious prosecution – and on three state law claims – false imprisonment, malicious prosecution, and abuse of process. The jury awarded Webb $80,000.00 in damages. The district court awarded attorneys' fees to the firm.

Carson City timely appealed the jury verdict to the appeals court. On May 29, 2003, the appeals court upheld the jury verdicts, and the appeals court awarded attorneys' fees to the firm.

Carson City failed to file its petition for writ of certiorari within the 90-day period of Supreme Court Rule 13.1. However, Carson City claims that it received an extension

of time from Justice O'Connor within which to file its petition for writ of certiorari.

STATEMENT OF THE FACTS

On June 27, 1997, Carson City Deputy Sheriff Darrin Sloan ("Deputy Sloan") pursued a speeding car in Carson City, Nevada. (Excerpt of Record "ER" 31-32.) The driver of the car pulled to a stop, exited the car, leapt a chain link fence, and fled. (ER 33-34.) Deputy Sloan described the driver of the car as a shirtless, black, 19-year-old man. (ER 35.) The car that this shirtless, black, 19-year-old man had been driving was identified almost immediately as belonging to one Freddy Little. (ER 35.) Five or so other deputy sheriffs set up a perimeter in approximately a one-half mile radius. (ER 34-35.) Within approximately 15 minutes, Carson City Deputy Sheriff Robert Guimont ("Deputy Guimont") discovered Webb behind a car within this perimeter. (ER 36 & 42.) Webb was carrying identification with his name on it; Webb was 32 years old (13 years older than the driver of the vehicle); and Webb was wearing a shirt. (ER 19.) The only trait the driver of the vehicle and Webb shared was they were both black men. (ER 37.)

Deputy Guimont handcuffed and arrested Webb on charges of obstructing a police officer, reckless driving, no valid driver's license, and no proof of insurance. (ER 38.) Deputy Guimont testified that Webb obeyed all of his commands. (ER 42.) He described Webb as "very cooperative" during his arrest. (ER 42.) Deputy Guimont further testified as follows:

Q. What, if anything, did Mr. Webb do to delay you that evening?

A. Other than us actually chasing him when we're supposed to be chasing someone else I can't think of anything else.

Q. Was he cooperative?

A. Yes, very cooperative.

Q. Was he polite?

A. Yes.

(ER 43.) Despite Webb's polite and cooperative behavior, Deputy Sloan and Deputy Guimont included the charge of obstructing a police officer because Webb had made the unfortunate mistake of being a black man in the vicinity and they had wasted their time chasing Webb rather than the suspect who had driven the vehicle.

On July 3, 1997, Deputy Sloan learned through another deputy sheriff and a confidential informant that Webb could not have been driving the speeding car he had chased on June 27, 1997. (ER 38-39.) Deputy Sloan acknowledged that this information he had learned through the confidential informant could only have come from the actual driver of the car. (ER 39.)

By July 7, 1997, Deputy Sloan had informed Carson City Deputy District Attorney Melanie Bruketta ("DDA Burketta") that Webb was not the driver of the car he had chased on June 27, 1997. (ER 40-41.) DDA Burketta recalled that Deputy Sloan had indeed spoken with her about Webb. (ER 44.) DDA Burketta further testified that she spoke with a Carson City municipal judge to secure Webb's release on the very day Deputy Sloan first had

spoken with her. (ER 44-46.) DDA Burketta further testified that this conversation with Deputy Sloan occurred the same day Webb was released from jail. (ER 44-46.) However, Carson City did not release Webb from jail until July 16, 1997. (ER 20-21.) DDA Burketta's testimony sharply differed from Deputy Sloan's, who testified that he spoke with DDA Burketta about Webb by July 7, 1997 – ten full days before Webb's release from jail. (ER 40-41.) DDA Burketta did not take any notes about her conversation with Deputy Sloan, as was her normal custom; and when pressured, she admitted that she could not remember the exact date she met with Deputy Sloan. (ER 44-48.)

DDA Burketta admitted that the Carson City DA's office has the power to determine who will be prosecuted. (ER 46.) She also stated the office policy for deputy district attorneys was as follows:

> Q. You had the authority at the time you had the conversation with Deputy Sloan to seek dismissal of this case, didn't you?
>
> A. Sure.
>
> * * *
>
> A. Yes, all deputies in the office could have dismissed the charges.

(ER 49.)

On August 15, 1997, Webb met with Carson City Deputy District Attorney Ray Oster ("DDA Oster") in the DA's office. (ER 22.) DDA Oster offered to dismiss the traffic charges – reckless driving, no valid driver's license, and no proof of insurance – if Webb would plead guilty to the charge of obstructing a police officer. (ER 24.) Webb refused the "deal." (ER 24)

After Webb refused DDA Oster's deal, it was time for the Chief Deputy District Attorney herself to intervene. (ER 25.) After all, three months or so had passed since Carson City knew it had arrested, imprisoned, and prosecuted the wrong man. The trial day was nearing. On September 3, 1997, Chief Deputy District Attorney Ann Langer ("CDDA Langer") tried a different approach: she told Webb that she would dismiss the charge of obstructing a police officer if he would agree to sign a waiver of civil liability. (ER 29.) Again, Webb declined. (ER 30.)

CDDA Langer tried yet another tactic. On approximately September 15, 1997, CDDA Langer threatened Webb publicly in front of four or five other persons. (ER 25-26.) CDDA Langer later told Webb's attorney that she was prosecuting Webb for obstructing a police officer because Webb refused to sign the waiver of civil liability. (ER 25-26.)

On October 30, 1997, CDDA Langer tried the case against Webb for obstructing a police officer. (ER 26.) A Carson City municipal judge found Webb innocent. (ER 27.)

Webb's arrest and lengthy incarceration caused him to lose his unemployment benefits, which in turn caused him to become homeless during the entire time these criminal charges were pending against him. (ER 27-28.)

REASONS FOR DENYING THE PETITION

Carson City argues that the appeals court misinterpreted or misunderstood the evidence and Nevada law and shifted the burden of proof to Carson City. According to

Carson City, the appeals court's opinion "will have profoundly negative consequences that extend far beyond" the State of Nevada. Pet. at 2. This is simply not the case, as the appeals court itself held.

Carson City ignores or misstates the evidence and jury findings, then applies this distorted picture of the appeals court's decision in an attempt to create error. Carson City's asserted errors amount to nothing more than a dispute about the evidence. Carson City concedes as much, stating, "[T]he Ninth Circuit misapprehended the evidence in the record." Pet. at 14.

Carson City also claims the appeals court misapplied the law, yet concedes the appeals court correctly stated its obligations under this Court's ruling in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). Pet. at 12, 14, and 15.

Supreme Court Rule 10 provides, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The appeals court's opinion is a correct interpretation of state and federal law and will not have the national consequences Carson City suggests. Carson City has presented no reason for this Court to grant its petition for writ of certiorari.

I. CARSON CITY'S GROUNDS FOR APPEAL CONSIST OF NOTHING MORE THAN ASSERTED ERRORS ABOUT FACTUAL FINDINGS.

Carson City's arguments for granting certiorari are intentionally confusing and internally inconsistent. A cursory review of Carson City's petition demonstrates that Carson City disputes the evidence adduced at trial. Carson

City attempts to cast its factual dispute as a legal argument by incorrectly asserting that the appeals court reached the "surprising conclusion" that it is municipal policy for its prosecutors "to effect baseless prosecutions." Pet. at 2. Carson City further claims there is no evidence that the district attorney ever delegated policymaking authority to deputy district attorneys. Carson City actually argues that the only evidence in the record demonstrates that deputy district attorneys were "constrained by the office policy of not prosecuting in the absence of probable cause." Pet. at 16. Carson City's arguments are without merit and are unworthy of this Court's consideration.

The jury, not the appeals court, unanimously found that Carson City had a custom, practice, and policy of prosecution without probable cause. On August 24, 2001, the jury reached the following unanimous verdict:

> We the jury in [sic] having been duly empanelled and sworn upon oaths do say that we have reached the following verdict:
>
> As to Defendant Carson City, number 1, did Plaintiff prove that Defendant Carson City has a custom, policy or practice that violated the Plaintiff's federal Constitutional right not to be prosecuted without probable cause?
>
> Answer: Yes.

(ER 50.) Substantial evidence supports this verdict.

As previously noted, three separate deputy district attorneys, including the chief deputy district attorney, each participated in the misdemeanor prosecution of Webb. Moreover, DDA Burketta testified that "all the

deputies in the office could have dismissed the charges against" Webb. (ER 49.) Webb acknowledges that DDA Burketta denied that the DA's office had a policy of prosecuting individuals without probable cause. However, this denial was not credible because it directly contradicted all other evidence adduced at trial. Deputy Sloan informed DDA Burketta by July 7, 1997, that Webb was not the driver of the car he had stopped. Indeed, Deputy Sloan even provided the DA's office with a report to this effect. Yet, DDA Burketta testified that she spoke with the Carson City municipal judge and secured Webb's release the same day that Deputy Sloan spoke with her. Webb was not released until July 16, 1997. Thus, DDA Burketta's testimony differed sharply from Deputy Sloan's. In addition, DDA Burketta, DDA Oster, and CDDA Langer each decided to proceed with the prosecution of Webb despite the arresting officer's clear statement to them that Webb was not the driver of the car he had chased.

The question whether a custom, policy or practice existed under 42 U.S.C. § 1983 is a jury question. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996). The evidence in this case demonstrates that three separate deputy district attorneys, including the chief deputy district attorney, on multiple occasions over months of time, independently elected to prosecute Webb without probable cause. Each separate deputy district attorney had authority to dismiss the case against Webb and in fact offered to do so if he would only release Carson City from liability. As this Court has held, "the word 'policy' generally implies a course of action consciously chosen among various alternatives. . . . " *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Each deputy district attorney consciously chose between alternatives – prosecute without probable

cause or dismiss the case against Webb – and these repeated, separate, and independent decisions occurred over a period of months of time. A clear custom, policy, or practice of prosecution without probable cause emerged. The jury lawfully and appropriately found that Carson City did indeed have a custom, policy, or practice of prosecution without probable cause. Accordingly, Carson City's arguments to this Court are nothing more than a dispute about the factual findings of the jury, which Carson City has inappropriately recast as error by the appeals court.

II. THE DISTRICT COURT AND THE APPEALS COURT PROPERLY HELD THAT UNDER NEVADA LAW DEPUTY DISTRICT ATTORNEYS HAVE FINAL POLICYMAKING AUTHORITY UNDER 42 U.S.C. § 1983.

Carson City correctly notes that in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), this Court "held that whether a particular official has final policymaking authority is a question to be decided by applying state law." Pet. at 12. Carson City then complains that the appeals court did just that – "relied on nothing more than a Nevada statute" to hold that deputy district attorneys' have policymaking authority in Nevada in the area of criminal prosecutions. Pet. at 13. Carson City then agrees that throughout the Nevada Revised Statues, the Nevada Legislature vested Nevada district attorneys with plenary control and authority over criminal prosecutions. Carson City also agrees that Nevada case law supports this proposition. Indeed, Carson City argues that Nevada district attorneys have final policymaking authority in the area of criminal prosecution.

Carson City argues that NRS 252.070(1) does not possibly mean what it says:

> All district attorneys are authorized to appoint deputies, *who may transact all official business to the offices to the same extent as their principals.*

(emphasis added.) Carson City argues that if this statute means what it says then a Nevada deputy district attorney would have all the power of the office, including the power to establish "policy about what hours the office is to remain open."[1]

Carson City's argument is without merit. Under NRS 252.070(1) and Nevada case law, Nevada deputy district attorneys have final policymaking authority because they are vested by state law with plenary control and authority over criminal prosecutions. Carson City notes that five other states in the appeals court have similar laws, suggesting that if other states have similar laws Carson City's position is somehow strengthened. Nevada and the other western states that Carson City has named each have sparsely populated rural areas with far-flung townships in which it is imperative that the district attorney and his or

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[1] NRS 252.050 establishes the office hours for Nevada district attorneys ("at least from 9 a.m. to 12 p.m. and 1 p.m. to 5 p.m. on all days except Saturdays, Sundays and non judicial days"), but does empower the Boards of County Commissioners "to extend the days and hours during which the office of the district attorney must be kept open for the transaction of public office." The fact that this statute exists (constraining power in this area) shows that the Nevada Legislature chose not to constrain policymaking authority over deputy district attorneys.

her deputies be vested with policymaking authority to serve the very purpose of the office they hold.

Carson City argues that if the Nevada legislature had intended deputy district attorneys to have final policymaking authority, even the district attorney himself or herself could not constrain that authority. Carson City is again wrong as a matter of Nevada law. In *Waymet v. Homes,* 912 P.2d 816 (Nev. 1996), the Nevada Supreme Court held that under Nevada law deputy district attorneys were at-will employees who could be terminated with or without cause and recognized with approval that district attorneys can and do exercise the authority to constrain the policymaking authority of deputy district attorneys. As the evidence in this case shows, the Carson City district attorney left policymaking authority to his deputy district attorneys – a decision Nevada law allows.

Carson City also argues that the appeals court mistook decisionmaking authority for policymaking authority. Pet. at 24. Again Carson City is wrong. The Nevada legislature expressly vested policymaking authority over criminal prosecutions in Nevada district attorneys – a position with which Carson City agrees. Through NRS 252.070(1), the Nevada legislature likewise vested policymaking authority in deputy district attorneys. Indeed, under NRS 252.070(1) the Nevada legislature expressly provided that Nevada deputy district attorneys are vested with the identical policymaking authority as Nevada district attorneys themselves.

The facts of this case demonstrate that all deputy district attorneys, including the chief deputy district attorney, possessed policymaking authority, not mere decisionmaking authority for Carson City in the area of

criminal prosecutions, and then exercised that policymaking authority. Each deputy district attorney possessed and exercised complete control over Webb's prosecution. In addition, Carson City was prosecuting Webb for a violation of Carson City Municipal Code 8.04.050, obstructing a police officer. (ER 25-27.) Despite the fact that the very arresting officer informed the DA's office that he had arrested the wrong person, each deputy district attorney independently chose to continue to prosecute Webb – not because Webb was guilty of anything, but because the DA's office wanted to protect Carson City from liability. Accordingly, the deputy district attorneys established for Carson City the parameters for prosecutions under Carson City Municipal Code 8.04.050 and demonstrated the lengths to which the DA's office would go to protect Carson City – the municipality – from civil liability. After all, Carson City correctly asserts that the deputy district attorneys themselves are absolutely immune from personal liability.

In a transparent attempt to divert this Court's attention, Carson City speculates that the appeals court's holding that will have a chilling effect on future prosecutions in Nevada. In *Edgar v. Wagner,* 699 P.2d 110, 112 (Nev. 1985), the Nevada Supreme Court flatly rejected such speculation, stating that "[w]e are persuaded that prosecutors will not be adversely affected in their discharge of public duties by the application of qualified immunity where the allegations suggest malicious prosecution." The appeals court's decision will only discourage malicious prosecutions.

Finally, this Court defers to the appeals courts in the interpretation and application of state law within their respective circuits. *McMillian v. Monroe County, Alabama,* 520 U.S. 781, 786 (1997). In this case, a respected Nevada

federal district judge, the Honorable Edward C. Reed, who has been practicing law in Nevada for 51 years,[2] concluded that under NRS 252.070(1) deputy district attorneys had final policymaking authority as a matter of law. The appeals court likewise reached the same conclusion. This Court should not disturb a decision that was independently made by judges with considerable experience interpreting Nevada law.

III. THE NINTH CIRCUIT DID NOT SHIFT THE BURDEN OF PROOF UNDER 42 U.S.C. § 1983.

Carson City argues that the appeals court somehow shifted the burden of proof from a civil rights plaintiff to a municipality to demonstrate that the municipality had not delegated final policymaking authority from a policymaking elected official to his or her deputy. A plain reading of the appeals court holding demonstrates no such burden shifting. The appeals court held that the evidence below demonstrated that the Carson City district attorney left policymaking authority to his deputy district attorneys as evidenced by the fact that three separate deputy district attorneys exercised final policymaking authority in Webb's continued incarceration and criminal prosecution. Carson City had argued to the appeals court that the case of *Cristie v. Iopa,* 176 F.3d 1231 (9th Cir. 1999), was authority for the proposition that Nevada deputy district attorneys did not have final policymaking authority. The appeals court held that *Cristie, supra,* was of no help to Carson City because it was "distinguishable in fundamental ways"

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[2] *See* 2003 Judicial Staff Directory, page 1277.

from the facts of this case. *Webb v. Sloan,* 330 F.3d 1158, 1165 (9th Cir. 2003). One of those fundamental ways was that "Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against Plaintiff without consulting with any supervisor." *Webb,* 330 F.3d at 1166. The appeals court did nothing in this case to diminish the burden of a civil rights plaintiff to prove that a municipality either had a long-standing practice or policy or that the action at issue was taken by a final policymaker. Webb did indeed meet his burden of proof, and nothing in the appeals court decision constitutes a shifting of that burden.

CONCLUSION

This Court should deny Carson City's petition for writ of certiorari because Carson City's asserted errors merely consist of a dispute as to the evidence and an alleged misapplication of a correctly stated rule of law. In addition, Carson City's assertion that the appeals court's decision will have adverse national consequences is nothing more than meritless speculation, rejected by the appeals court.

October 28, 2003.

Respectfully submitted,

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No. 03-464

In the Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The briefs in opposition submitted by respondent David Webb and by putative intervenor Cooke & Story, Ltd. ("Cooke & Story"), a law firm that represented Webb in the lower courts, are most notable for what they do not say. Neither seriously disputes the existence of the circuit conflicts identified in the petition (at 22-24, 28-29) on both questions presented. Neither denies that this Court's case law in the area of municipal liability – and in particular, the legal framework governing the determination whether a municipal employee is a "final policymaker" under *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) – would benefit from clarification. See Pet. 12-13, 20-22, 27. Neither disputes our showing (Pet.18-19 & nn.4-5) that many other States have statutes identical to or indistinguishable from NEV. REV. STAT. § 252.070(1), so that the impact of the Ninth Circuit's decision will be felt far outside Nevada. See also Br. *Amicus Curiae* of Nevada Public Agency Insurance Pool, at 3-5. And neither denies that the Ninth Circuit's decision effectively allows plaintiffs in Section 1983 actions to circumvent the protections of absolute immunity afforded to prosecutors.

Apart from discussing miscellaneous record facts that have no bearing on the pure questions of law presented in the petition, respondent and his former law firm devote most of their efforts to disputing our reading of the Ninth Circuit's decision. These arguments are meritless. Further review is plainly warranted.

1. Respondent and his former law firm would like this Court to believe that petitioner is merely disputing the factual findings of the jury. That submission, however, is incorrect.

Contrary to Cooke & Story's suggestion (at 6-9), the Ninth Circuit's decision squarely holds, as a matter of law, that Carson City Deputy District Attorneys are final policymakers based *exclusively* on NEV. REV. STAT. § 252.070(1). See Pet. App. 8a-11a. Indeed, the panel began its analysis by stating:

> Plaintiff argues that he proved *both* that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent *and* that municipal liability is proper in this case because the deputy district attorneys were acting with final policymaking authority. Because we agree with the second argument, a question that we previously left open, we need not reach the first.

Pet. App. 7a (citation omitted). It is the Ninth Circuit's resolution of this question of law that petitioner challenges, not any factual finding by the jury.

Moreover, Cooke & Story's argument ignores the fact that the *district court* also resolved the question of final policymaking authority against Carson City *as a matter of law* (again, solely on the basis of NEV. REV. STAT. § 252.070(1)). See Pet. 5-8. On the strength of that pre-trial ruling, and over the City's objection, the district court gave three instructions (unmentioned in Cooke & Story's brief) that established for the jurors that deputy district attorneys are final policymakers as a matter of law. See Pet. 7-8. Those instructions, upheld by the Ninth Circuit as a correct statement of the law, relieved the jury of the need to make any factual inquiry about the policymaking authority of deputy district attorneys or whether they actually exercised that authority. The instructions also affirmatively directed the jury to ignore any evidence on the subject by deciding the issue as a matter of law. Thus, there was no finding of fact for the jury to make on this point.

To be sure, the court of appeals did hint at the possibility that a municipality might, in certain circumstances, be able to show that the final policymaking authority supposedly conferred on deputy district attorneys by NEV. REV. STAT. § 252.070(1) was *constrained* by the principal district attorney. See Pet. 10-11. But the panel dismissed that possibility in this case on the ground that "Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority." Pet. App. 10a. As we explained in the petition (at 27-29), the Ninth Circuit's placement of the burden of proof *on*

the municipal defendant is wrong and conflicts with the decisions of other circuits. But here again, petitioner is not challenging a factual finding made by the jury but rather the Ninth Circuit's resolution of a pure question of law: Who bears the burden of proving the existence of final policymaking authority in a *Monell* action under Section 1983?[1]

2. Cooke & Story also disagrees (at 13) that the Ninth Circuit "shifted the burden of proof from a civil rights plaintiff to a municipality to demonstrate that the municipality had not delegated final policymaking authority from a policymaking elected official to his or her deputy." But it is difficult, at best, to attach any other meaning to the Ninth Circuit's words:

> We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, *because Carson City presented no evidence* that its principal district attorney actually has constrained the deputies' authority.

Pet. App. 10a (emphasis added in part). What could that possibly mean if not that the municipality has the burden of proof on this issue? There is no other plausible reading, and none suggested by Cooke & Story or by the respondent.[2]

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[1] To the extent that the petition discusses the evidence presented in Carson City's case-in-chief relating to the existence of a municipal policy *not* to prosecute without probable cause (see Pet. 6-7, 14-15), it does so only to demonstrate the problems (and perverse outcomes) that flow from applying the two rules of law adopted by the Ninth Circuit. Notably, neither respondent nor its former law firm disputes that (a) evidence was presented at trial that the Carson City District Attorney's office had a policy of *not* prosecuting in the absence of probable cause, and (b) both the court of appeals and the district court decided the issue of municipal policymaking authority without any reference to that evidence.

[2] It is no answer to say, as Cooke & Story does (at 13-14), that there was

3. Cooke & Story next maintains (at 6, 9, 14) that petitioner is really just challenging "an alleged misapplication of a correctly stated rule of law." To support that claim, the law firm points to petitioner's acknowledgment that, under *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), and *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), the question whether the municipal official's "actual function" is that of a "final policymaker" for the municipality is "dependent" on state law. *McMillian*, 520 U.S. at 786.

Cooke & Story's argument is mistaken. As explained in the petition (at 12-16), the Ninth Circuit's decision is *inconsistent with* this Court's decisions because it ignores the crucial distinction between *policymaking* authority on the one hand and *decisionmaking* authority (or discretion) on the other. The Ninth Circuit simply lost sight of the nature of its task under this Court's decisions: rather than consider who has authority to make *municipal policy* – the question that this Court's precedents dictate must be asked *even when the single act of one individual is at issue* – the Ninth Circuit focused on who had *decisionmaking authority* about Mr. Webb's prosecution, as if every decision about every prosecution were *ipso facto* the making of municipal policy. In making that error, the Ninth Circuit contradicted this Court's precedents and placed itself in conflict with many other circuits. Thus, Cooke & Story is wrong to suggest that petitioner's argument is that a correct rule

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evidence presented *by Carson City* that any deputy in the office had the *discretion* to dismiss the charges against respondent without consulting with a supervisor. Not only does that argument (once again) confuse discretion with final policymaking authority, but it also ignores the fact that the district court denied Carson City's motion to dismiss at the close of Webb's case (before any of this evidence was presented). See Pet. 6. Only by assigning to Carson City the burden of proof on this issue could the Ninth Circuit affirm the judgment.

of law was misapplied by the Ninth Circuit. The correct rule of law was *disregarded*.[3]

Even with respect to the subsidiary principle that state law informs the inquiry into whether a municipal official has final policymaking authority, Cooke & Story's argument fails. To be sure, petitioner does acknowledge that this inquiry is dependent on state law. But, as explained in the petition, the Ninth Circuit was wrong to place "unquestioning reliance on state law to the exclusion of all other evidence." Pet. 19. Indeed, as we showed in the petition (at 19-20), the Ninth Circuit's approach in this regard is flatly inconsistent with *McMillian*.

4. Urging this Court to grant review, putative *amicus curiae* Nevada Public Agency Insurance Pool helpfully points out (at 7-8) that the decision below also squarely conflicts with the Eleventh Circuit's decision in *Brown* v. *Neumann*, 188 F.3d 1289 (1999) (per curiam). In *Brown*, the plaintiffs brought a municipal liability claim under *Monell* based on arrests made by a Deputy Sheriff of Palm Beach County. The plaintiffs "concede[d] that the Deputy Sheriff was not carrying out the instructions of the Sheriff, that the Sheriff did not know about, ratify, or consent to the Deputy Sheriff's acts, and that there was no custom of unjustified arrests." 188 F.3d at 1290.

Nonetheless, the plaintiffs maintained that "the following Florida statute effectively confers final decisionmaking authority directly on Deputy Sheriffs for *Monell* purposes:

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[3] To distinguish between policymaking authority and discretion, some factual inquiry is necessary. As *Praprotnik* points out, even an official with policymaking authority can make decisions that do not constitute an exercise of that authority. Only an understanding of the function and practices of a particular official in the context of her governmental responsibilities will make it possible to draw the line between the exercise of discretion and the exercise of policymaking authority. The Ninth Circuit erred in refusing to conduct such an inquiry.

> 'Sheriffs may appoint deputies to act under them who *shall have the same power as the sheriff appointing them*, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.'

Fla. Stat. § 30.07." 188 F.3d at 1291 (emphasis added). Compare NEV. REV. STAT. § 252.070(1) ("All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals."). "The *only reasonable interpretation*" of the highlighted language, the Eleventh Circuit explained, "is that it does not put Deputy Sheriffs on a par with Sheriffs in terms of final policymaking authority, and that the power referred to encompasses merely those powers which the Sheriff chooses actually to delegate." 188 F.3d at 1291 (emphasis added). "[I]t would be contrary to common sense," the Eleventh Circuit added, "to hold that a Deputy Sheriff's discretionary decisions in the field amount to official policy * * * ." *Ibid.* Exactly so.[4]

5. Predictably, respondent and his former law firm both claim that the decision below is correct. But both apparently fail to grasp the fundamental distinction between decisionmaking authority (or discretion) and policymaking authority – the same mistake made by the Ninth Circuit. See Cooke & Story Br. in Opp. 11-12. Thus, the law firm recycles

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[4] Interestingly, in *Brown* the municipality's lawyer argued on appeal that the Florida statute was "simply a restatement of the doctrine of *respondeat superior*." Brief of Appellee, *Brown* v. *Neumann*, No. 98-5722, 1999 WL 33618580, at *9 (June 14, 1999). The same may also be true of NEV. REV. STAT. § 252.070(1), which immediately precedes a provision stating: "District attorneys are responsible on their official bonds for all official malfeasance or nonfeasance of the deputies." NEV. REV. STAT. § 252.070(2). If so, that would be all the more reason why the Ninth Circuit went astray. See also *Moor* v. *County of Alameda*, 411 U.S. 693, 706 (1973) (per curiam) (rejecting incorporation, under 42 U.S.C. § 1988, of state-law rule of vicarious liability as inconsistent with Congress's intent concerning the scope of municipal liability); accord *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 733 (1989).

the argument that deputy prosecutors in Nevada necessarily have *policymaking* authority because they have discretion or decisonmaking authority over how criminal prosecutions are conducted. *Id.* at 10-11. That is a *non sequitur*. See Pet. 16-18. Nor is the law firm correct in saying (at 10) that NEV. REV. STAT. § 252.070(1) expressly confers policymaking authority directly on deputies. The statute makes no mention of policymaking authority; it refers instead to deputies' being authorized to "transact" the "official business relating to" their offices. The statute does nothing more than allow the district attorney to carry out his statutory responsibilities through deputies. See also note 4, *supra*.[5]

6. Lastly, Cooke & Story points out (at 12-13) that this Court often defers to interpretations of state law that have been accepted by the lower federal courts. In particular, it cites this Court's decision in *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), where the majority indicated that it would defer to the expertise of the Eleventh Circuit in interpreting Alabama law. *Id.* at 786 & n.3; compare *id.* at 798 n.1 (Ginsburg, J., joined by Stevens, Souter and Breyer, JJ., dissenting) (stating that "[d]eference * * * does not supplant careful review").

For at least three reasons, *McMillian* presented a much stronger case for deference. *First*, in deferring to the lower court there, this Court emphasized that "two of the three judges on the Eleventh Circuit's panel are based in Alabama" and that "this is the second Eleventh Circuit panel" to have adopted a particular interpretation of Alabama law. 520 U.S. at 786 & n.3. Here, in contrast, the three judges on the Ninth Circuit panel are based in California and Oregon, not Nevada; and no other panel

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[5] Cooke & Story's reliance (at 12) on *Edgar* v. *Wagner*, 699 P.2d 110 (Nev. 1985) (per curiam), is misplaced. That case merely held that a district attorney who is acting "as an administrator or investigator" – as opposed to carrying out a "prosecutorial function," as the deputy district attorneys did here – is entitled to qualified rather than absolute immunity. *Id.* at 112 (citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)).

of the Ninth Circuit has ever adopted the novel construction of NEV. REV. STAT. § 252.070(1) endorsed below. See *Leavitt* v. *Jane L.*, 518 U.S. 137, 145 (1996) (per curiam) (in summarily reversing the Tenth Circuit, noting that an argument based on "the supposed greater expertise of courts of appeals regarding state law is particularly weak" where a "panel consisting of judges from Oklahoma, Colorado, and Kansas" has decided an issue of Utah law).

Second, in *McMillian* the Alabama Supreme Court had "interpreted the[] [relevant] provisions and their historical background as evidence of 'the framers' intent to ensure that sheriffs be considered executive officers of the state'" – a fact that the *McMillian* majority cited as "critical[]." 520 U.S. at 789. Here, in contrast, the Nevada Supreme Court has never interpreted NEV. REV. STAT. § 252.070(1) as delegating final policymaking authority to deputy district attorneys. Nor has the Nevada Supreme Court interpreted the other Nevada statutes with identical language (applicable to deputy county clerks, recorders, assessors, or sheriffs, see Pet. 17) in this way.[6]

Third, in *McMillian* the embedded state-law issue involved an interpretation of the text and history of multiple, related provisions of the Alabama Constitution and statutes as well as numerous decisions of the Alabama courts. See 520 U.S. at 787-91. Here, in contrast, the interpretive issue turns on the meaning of a single sentence in a single statute. See *Cole* v. *Richardson*, 405 U.S. 676, 683 (1972) (according no deference to three-judge panel's "highly literalistic" reading of bare text of state statute). The court of appeals is in no better position than this Court to say what that sentence means. See *Leavitt*,

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[6] As explained in the petition (at 16-17), the cases relied on by both the district court and the Ninth Circuit panel, *Cairns v. Sheriff, Clark County*, 508 P.2d 1015 (Nev. 1973), and *Lane v. Second Judicial Dist. Court*, 760 P.2d 1245 (Nev. 1988), deal only with the autonomy of the district attorney in his prosecutorial role, not his final policymaking authority or his power to delegate such authority to deputies.

518 U.S. at 145 (rejecting argument that court of appeals has "some natural advantage in this domain"); *Salve Regina College* v. *Russell*, 499 U.S. 225, 238 (1991).

In any event, this Court "surely ha[s] the authority to differ with the lower federal courts as to the meaning of a state statute," and has not hesitated to do so where "the court of appeals' state-law ruling is plainly wrong" (*Leavitt*, 518 U.S. at 145 (internal quotations omitted)) or is "unreasonable" (*Propper* v. *Clark*, 337 U.S. 472, 486-87 (1949)). See also *Brown* v. *Neumann*, 188 F.3d 1289, 1291 (11th Cir. 1999). Whatever deference may be afforded to the Ninth Circuit's reasoning, it does not compel this Court to ignore the obvious flaws in its analysis and the serious consequences of its decision. See also *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 129-30 (1988) (plurality opinion) (reversing court of appeals' determination, which was based on an analysis of the municipality's laws, that certain city officials were municipal policymakers).

Finally, even if deference to the panel's reading of NEV. REV. STAT. § 252.070(1) were appropriate *at the merits stage* of this case, that would not make the first question less worthy of this Court's review.[7] Plainly, the need to grant deference where appropriate has not prevented this Court from reviewing a series of lower-court decisions involving the issue of final policymaking authority under *Monell*. Moreover, as explained above, the panel's flawed reading of NEV. REV. STAT. § 252.070(1) was only half the problem. The other problem was the panel's "unquestioning reliance on state law to the exclusion of all other evidence" (Pet. 19) – an approach that is flatly inconsistent with *McMillian*. That blinkered approach caused the Ninth Circuit, perversely, to disregard the only evidence presented at trial as to whether the Carson City District Attorney's office actually had a policy of initiating or continuing prosecu-

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[7] The argument about the need to accord deference to the Ninth Circuit has no bearing, of course, on the second question presented. The proper burden of proof in a Section 1983 action is a question of federal law.

tions without probable cause: evidence showing that the District Attorney had an official policy *against* pursuing such prosecutions. The Ninth Circuit's flawed methodology is reason enough to grant review of the first question presented.[8]

* * *

This case presents two important questions of federal law on which there is no dispute that the circuits are sharply divided. If permitted to stand, the Ninth Circuit's misguided decision – which disregards this Court's teachings – will have serious adverse effects on municipal liability not just in Nevada but also in other States both inside and outside the nation's largest circuit. It will also permit an end run around the vital protections of absolute immunity afforded to prosecutors in actions brought under Section 1983. To prevent these adverse consequences, and bring uniformity and greater clarity to this important area of federal law, this Court's review is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Cooke & Story has moved to intervene. In petitioner's view, if this Court grants the petition, it should deny the motion to intervene, treat the brief in opposition submitted by Cooke & Story as an *amicus* brief, and then appoint Cooke & Story to represent respondent Webb. That would allow Cooke & Story to be heard and participate without the complications that would follow from formal intervention.

Respectfully submitted.

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No. 03-464

In The
Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEVADA PUBLIC AGENCY INSURANCE POOL IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the Nevada Public Agency Insurance Pool, by and through its attorneys, Thorndal, Armstrong, Delk, Balkenbush & Eisinger, respectfully moves this Court for an order granting leave to file an *amicus curiae* brief in support of Petitioner Carson City in the above-entitled matter. The parties have not consented to the filing of such a brief.

INTEREST OF THE NEVADA PUBLIC AGENCY INSURANCE POOL

In this case, the Nevada Public Agency Insurance Pool (hereinafter "Pool") represents 15 Nevada counties, 12 Nevada municipalities, 6 Nevada towns and 48 public districts and agencies in the state. Many of these public entities employ district attorneys or prosecutors who act on behalf of municipalities. Many also employ deputy court clerks, recorders, treasurers, and assessors and many employ deputy sheriffs.

The Appellate Court below ruled that deputy district attorneys in Nevada have final policymaking authority such that their singular acts can create municipal liability under 42 U.S.C. § 1983 and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). The Court based its decision, in part, on statutory language that is identical in separate provisions regarding all of the deputy positions mentioned above. As a result, if the Court 's ruling is not reviewed, all such deputies in Nevada are, as a matter of law, imbued with the power to bind their employers by their individual discretionary decisions. The ruling, therefore, has the effect of creating potential municipal liability for many of

the members of the Pool where none apparently existed before.

Unfortunately, the parties to this action may not adequately present the arguments to protect those deputies from the lower court's ruling. The facts presented deal solely with the actions of a deputy district attorney and have no relation to the acts of a deputy clerk, recorder, sheriff, or treasurer. Carson City's liability in this case is based solely on the purported policymaking authority of its deputy district attorney. In avoiding liability in this action, Carson City does not have an urgent interest to argue for the non-liability of deputy clerks and treasurers. Accordingly, the Pool is very concerned that its interests in avoiding future municipal liability will not be adequately represented by the named parties to this action.

ISSUES ADDRESSED BY MOVANT IN BRIEF

The Pool, in its Brief in Support of Petitioner's Petition for Certiorari, will address the ramifications of the lower court's decision, particularly inasmuch as the decision would affect deputies in positions not directly addressed by the lower court, *i.e.*, clerks, recorders, treasurers, and sheriffs. In particular, the Pool will address the conflicts created by the decision with other Federal Circuit Courts as well as state statutes and decisions within the Ninth Circuit. In addition, the Pool, on behalf of its members, wishes to advance arguments regarding the policymaking authority of such employees not presented by Carson City in its principal brief. The Pool therefore requests leave of court to file the *amicus curiae* brief filed herewith.

ASSISTANCE TO BE RENDERED TO THE COURT BY MOVANT

Petitioner addresses the propriety of the Ninth Circuit's ruling with regard to deputy district attorneys as well as the conflicts created with other federal circuits with regard to whether a deputy district attorney is a policymaker for the purposes of establishing municipal liability. These arguments may not address sufficiently the full extent of the lower court's decision with regard to other types of deputies. The brief of *amicus curiae* provides this Court with a more extensive discussion of the conflicts created by the lower court's ruling with regard to those other deputies.

CONCLUSION

For the above stated reasons, the Nevada Public Agency Insurance Pool respectfully urges the Court to grant this motion for leave to file the accompanying *amicus* brief in the present case in support of the Petition of Petitioner.

Dated: November 19, 2003.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION

INTERESTS OF *AMICUS CURIAE*[1]

This brief of *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. A motion for leave to file this Brief is attached hereto.

Amicus, the Nevada Public Agency Insurance Pool (hereinafter "Pool"), is a public entity formed pursuant to Nevada Revised Statute (NRS) 277.055 to provide for joint purchase of insurance or for self-insurance of the members' property and casualty risks. The Pool represents 15 Nevada counties, 12 Nevada municipalities, 6 Nevada towns and 48 other public districts and agencies in the state.

Many of these public entities employ district attorneys or prosecutors who act on behalf of municipalities. Many also employ deputy court clerks, recorders, treasurers, and assessors and many employ deputy sheriffs. These employees are often required to exercise discretion in carrying out their daily duties. If the court's decision below is allowed to stand, all such deputies in Nevada may, as a matter of law, be found to have final policymaking authority such that their singular acts can create municipal liability under 42 U.S.C. § 1983 and *Pembaur v. City of Cinncinnati*, 475 U.S. 469, 479-80 (1986).

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The ruling of the court below has the potential effect of creating municipal liability for many of the members of the Pool where none existed before.

The Pool is a public entity created pursuant to NRS 277.055 and acts on behalf of its members, through the direction of the Board of Directors and its Executive Director. Filing of an *amicus* brief has been authorized by the Board of Directors and the Executive Director.

INTRODUCTION

Amicus supports Petitioner's argument that the decision of the court of appeals creates a circuit conflict, as well as conflict among the States within the Ninth Circuit itself. *Amicus* submits this brief to make the Court aware of the importance of the decision below and its potential to do significant damage in a wide range of situations.

SUMMARY OF ARGUMENT

The court of appeals for the Ninth Circuit created a circuit conflict when it held that deputy district attorneys in Nevada are policymakers for the purpose of establishing municipal liability. Not only does this decision have ramifications for all future prosecutorial decisions made by Nevada deputy district attorneys, but the Ninth Circuit has effectively held that the acts of deputy clerks, treasurers, assessors and recorders in the State of Nevada can likewise provide the basis of municipal liability. Such a holding conflicts with other federal circuit courts as well as with decisions of state courts within the Ninth Circuit.

ARGUMENT

The statute on which the appellate court based its decision states that deputy district attorneys may transact business "to the same extent as their principals." NRS 252.070(1). The court concluded that this language indicates that if district attorneys are final policymakers, so too are deputy district attorneys, and municipal liability may be based on their actions. The position of the *amicus*, however, is that if the appellate court's decision is allowed to stand, it will have far reaching effects in the State of Nevada and other Ninth Circuit States regarding deputies of other local public officials.

A. Impact in Nevada

A review of other Nevada statutes pertaining to public offices demonstrates the impact of the appeals court's ruling. For instance, NRS 247.040(1) provides as follows: "All county recorders are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office, to the same extent as their principals. A deputy must be at least 18 years of age." Chapter 247 of the Nevada Revised Statutes further provides the specific duties of the county recorder. Specifically, NRS 247.060 provides that "[a] county recorder is empowered to take and certify the acknowledgment and proof of all conveyances affecting real property, or of any other written instrument, for which he shall receive the same fees as are prescribed by law."

A number of other provisions of Chapter 247 further describe the precise manner in which a county recorder is to properly record documents. For instance, NRS 247.100 provides that "[e]ach county recorder shall: (1) Record each

document in the order in which it is received; (2) Maintain a record of all transactions conducted within the office and a record of all fees collected; and (3) Make the records maintained pursuant to subsection 2 available for public inspection during regular business hours."

As the language with respect to the appointment of county recorders is identical to that pertaining to the appointment of deputy district attorneys, under the holding of the appellate court, county recorders would also be considered policymakers for purposes of establishing municipal liability under 42 U.S.C. § 1983. And, since a deputy's authority is coextensive with the recorder, the deputy county recorder would also be considered a policymaker. Thus, if a deputy county recorder were to record a document improperly, a municipality could, according to the decision below, conceivably be liable for the deputy's actions.

Similarly, NRS 246.030, pertaining to county clerks, provides as follows: "All county clerks are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office, to the same extent as their principals. A deputy must be at least 18 years of age." NRS 246.030(1).

Again, this language is identical to that utilized by the legislature with respect to the appointment of deputy district attorneys. Under the holding of the appellate court, all deputy county clerks could subject the municipality to liability under 42 U.S.C. § 1983.

Further, NRS 250.060, which pertains to county assessors, provides as follows: "All county assessors are authorized to appoint deputies, who are authorized to transact all official business appertaining to the offices, to

the same extent as the county assessors. A deputy must be at least 18 years of age." NRS 250.060(1)

Under the rationale of the appellate court, the language of NRS 250.060 would implicitly grant policymaking authority to deputy county assessors.

Finally, NRS 248.040, which pertains to county sheriffs, provides as follows: "Except as provided in NRS 248.045, each sheriff may: (a) Appoint, in writing signed by him, one or more deputies, who may perform all the duties devolving on the sheriff of the county."

Applying the reasoning of the appellate court, all deputy sheriffs in Nevada would also be final policymakers for their municipal employers.

In an attempt to minimize the consequences of its decision, the appellate court stated in a footnote:

> We are not persuaded that our holding will have the crushing effect that amicus urges. First, our holding does not address whether the principals who hold those other positions are final policymakers for municipalities. If a county recorder is not a final policymaker, then a deputy county recorder exercising coextensive authority is not a final policymaker.

Webb v. Sloan, 330 F.3d 1158, 1166 n. 5 (9th Cir. 2003). Though the Nevada Supreme Court has not held a county assessor, recorder, clerk, treasurer or sheriff to be a policymaker for the county, it is likely it could do so should the opportunity arise. For instance, in other jurisdictions assessors have been determined to be policymakers for establishing municipal liability.

In *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), a female county employee working in the county assessor's office brought a retaliatory discharge suit against her male supervisor (the county assessor) and the county. *Id.* at 811. The court concluded that the county assessor had final policymaking authority to set employment policy as to the hiring of his staff, and that therefore the assessor's act was an act of the county. *Id.* at 818.

In *General Motors Corp. v. City of Linden*, 653 A.2d 568 (N.J. App. Div. 1995) (*rev'd on other grounds*), an owner of real property brought a civil rights action against a city and its tax assessor. *Id.* at 571. The court found that the city tax assessor's deprivation of constitutional rights in assessing property may be found to constitute the official policy of the municipality which appointed the assessor. *Id.* at 578. In finding that the assessor was a final policymaker, the court relied on NJSA 54:4-23. That statute confers plenary authority upon a tax assessor to "determine the full and fair value of each parcel of real property situate in the taxing district" and to "compute and determine the taxable value of such real property at the level established for the county pursuant to law." *Id.*

Similarly, in Nevada,

> the county assessor . . . shall ascertain by diligent inquiry and examination all real and secured personal property that is in his county on July 1 which is subject to taxation. . . . He shall then determine the taxable value of all such property, and he shall then list and assess it to the person, firm, corporation, association or company owning it on July 1 of that fiscal year.

NRS 361.260(1). With the same plenary authority granted to an assessor in Nevada, it would be likely that a Nevada court, following *General Motors Corp.*, *supra*, would also find a county assessor has final policymaking authority for the county. If this were so, according to the appellate court's decision in this case, the deputy county assessor would also be a policymaker with the ability to bind the municipality under 42 U.S.C. § 1983.

Similarly, as to each department mentioned above, the principals could arguably be called policymakers which would then in turn place policymaking authority with the deputies and saddle counties with liability for the deputies' action. The appellate court's decision essentially affirms such a result. However, this places the Ninth Circuit in conflict with other circuit courts.

B. Conflict in the Federal Circuit

The decision below creates a conflict with other federal circuit courts. For instance, in *Brown v. Neumann*, 188 F.3d 1289 (11th Cir. 1999), an arrestee brought a § 1983 action against a county for the actions of a deputy sheriff. *Id.* at 1290. The applicable statute in that case was Fla. Stat. § 30.07 which stated: "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible." *Id.* at 1291. The court, however, rejected the argument that the deputy sheriff was a final policymaking authority in Florida. *Id.* The court reasoned that "the only reasonable interpretation of the 'same power as the sheriff' language is that it does not put Deputy Sheriffs on a par with Sheriffs in terms of final

policymaking authority, and that the power referred to encompasses merely those powers which the Sheriff chooses actually to delegate." *Id.*

The decision of the Ninth Circuit in this matter places the Circuit in conflict with others which hold that the "same power" language in statutes does not create a policymaker out of deputies. *Id.*; *see also Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Taylor v. Monfils*, 165 F.3d 511 (7th Cir. 1998). And, in fact, the Ninth Circuit would create policymakers out of not only deputy district attorneys but also sheriffs, recorders, treasurers, assessors and clerks. The only possible manner in which to resolve this conflict among the circuits is to subject the Ninth Circuit's decision to review by this Court.

C. Conflict with Ninth Circuit States

The decision of the court of appeals also places the circuit at odds with various state court decisions within the circuit which have determined that their legislature has *not* given deputies policymaking authority. In showing the effect the appellate court's decision will have on other States within the Ninth Circuit, Petitioner, in its Petition for a Writ of Certiorari, cites Ariz. Rev. Stat. § 38-462. This statute states that deputy county officers in Arizona possess the *same powers* and duties as the principals. It is very interesting, then, that the Arizona Supreme Court in *City of Phoenix v. Yarnell*, 909 P.2d 377 (Ariz. 1995), did *not* find that all deputy district attorneys were, as a matter of law, final policymakers for the purpose of establishing municipal liability. *Id.* at 387-88. The Ninth Circuit's ruling with respect to deputies in Nevada, however, would

also affect the deputies in Arizona, making them policy-makers as well for purposes of § 1983 municipal liability.

Petitioner also cites Cal. Gov. Code, Title 3, § 24000, which states that "whenever the official name of any principal officer is used in any law confirming power or imposing duties or liabilities, it includes deputies." Thus, like Nevada, the power of a deputy is coextensive with the principal. However, the decision of the Ninth Circuit is directly in conflict with the decision of a California court which determined that the acts of deputies could *not* form the basis of liability for municipalities under § 1983. *See Bach v. County of Butte*, 147 Cal.App.3d 554, 195 Cal.Rptr. 268 (1983).

In *Bach*, the court recognized that local elected officials and appointed department heads could make policy which would subject their governmental employers to liability. *Id.* at 278. However, the court was loathe to extend this principle to deputies. *Id.*

> If the acts of municipal employees other than elected representatives or departmental supervisors are held to constitute official policy sufficient to impose federal Civil Rights Act liability on municipalities, then municipalities will be routinely liable for the tortious acts of their employees that violate Constitutional rights. Such a result would run counter to the teachings of *Monell* that there is no respondeat superior liability under section 1983.

Id. (citation omitted). The court further reasoned that, even though prosecutors have immunity from suit for prosecutorial decisions, subjecting the county to liability for the decisions of the deputy would "invite end runs around the prosecutorial immunity doctrine." *Id.* The court

acknowledged that prosecutors would be called to testify regarding prosecutorial decisions and would provoke a significant chilling effect on prosecutions. *Id.* Accordingly, the court found the deputy prosecutor's actions could not be said to represent official policy or custom sufficient to make the county liable under § 1983. *Id.*

The Ninth Circuit's ruling adversely impacts not only Nevada Deputy District Attorneys, but all official deputies in Nevada. Further, deputies in Arizona, California, and other Ninth Circuit States may now subject their municipal employers to liability by their conduct. Such a holding conflicts with decisions in other federal circuit courts as well as State court interpretations of the same issue. Accordingly, this Court should review the Ninth Circuit's decision in this matter and grant Petitioner's Petition for a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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